Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

DIANA FAIRECHILD,
Petitioner,

v.

UNITED AIRLINES, INC AND
PACIFIC INSURANCE COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

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a. QUESTIONS PRESENTED

1. Does a State via its laws impose a condition of slavery upon all employees within the state when its laws give the employers the right to intentionally injure the employees without recourse to the common law by the employees in violation of Amendment XIII?

2. Has the State of Hawaii via Sections 386-5 and 386-6 Hawaii Revised Statutes (HRS) subjected all employees to a form of Involuntary Servitude by making it part of every employment contract that the employers can willfully and with premeditation poison the employees and at the same time deprive the willfully injured employees of their common law rights?

3. Has the State of Hawaii via Sections 386-5 and 386-6 HRS subjected this employee to incidents of Slavery by making it part of her employment contract that her Master could intentionally poison her while she was working in her Master's cabin and deny her the right to be free from such cruel and brutal treatment and deny her the freedom to hold the Master liable under the Common Law?

(a) Does the State thereby impose upon the Servant and enforce against the Servant an incident of Involuntary Servitude in violation of Amendment XIII?

4. When the highest State Court approves of and enforces said restraint, refuses to hear oral argument by the Servant and uses a "Memorandum Opinion" to dispose of the Servant's complaint against the Master:

(a) Does the State thereby endorse and/or enforce an act of slavery in violation of Amendment XIII?

(b) Does the State thereby endorse and/or enforce an act of Involuntary Servitude in violation of Amendment XIII?

(c) Has the State thereby denied the intentionally injured Servant due process, in violation of Amendment XIV?

(d) Has the State thereby denied the Servant the equal protection of the law in violation of Amendment XIV?

5. Whether the Labor and/or Workers' Compensation Laws of the Several States, as written and/or as interpreted and enforced are dividing (or have divided) the United States into "Free States and/or Slave/Involuntary Servitude States": in violation of Amendments XIII and XIV, our heritage, culture, and history?

6. Whether the record demonstrates that the Labor and/or Workers' Compensation Laws of the Several States, as written and as construed and enforced against employees are a continuation of a type of "Fugitive Slave Act" in violation of Amendments XIII and XIV?

7. Whether, in view of the fact that Amendment XIII, designated herein as "The Freedom Law," is not self-executing, it is the duty of the Federal Courts and the Judges and Justices thereof to enforce the prohibition of Slavery and Involuntary Servitude, sua sponte, whenever the facts in the case demonstrate the presence of the brutal and cruel incidents and badges of Slavery and/or Involuntary Servitude?

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b. THE NAMES OF ALL THE PARTIES ARE IN THE CAPTION

No._____

IN THE SUPREME COURT OF THE UNITED STATES

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d. OFFICIAL AND UNOFFICIAL REPORTS

Copies of the official and unofficial reports are presented in a separate volume "Appendix." They are:

"A" Memorandum Opinion dated 01/16/97 "A" Supreme Court, State of Hawaii

"B" Order denying Motion for Reconsideration dated 02/05/97 "B" Supreme Court, State of Hawaii

"C" Order granting defendant's Motion for Judgment on pleadings dated 12/23/96 U.S. District Court Northern District of California "C"

"D" Copies of communications between USDC Northern District of California and Hawaii State Supreme Court "D"

"E" Decision and Order dated 12/02/94 Hawaii State Labor and Industrial Relations Appeals Board "E"

e. GROUNDS OF JURISDICTION

Jurisdiction is invoked pursuant to 28 USC Section 1257 (a), Rule 13.1 Revised Rules of the Supreme Court of the United States and Article III and Amendment XIII of the Constitution. Petitioner relies on the case of Dred Scott v. Sanford, 60 US 393 (1856) and Prigg v. Pennsylvania 41 US 539 (1842) and other pre-Civil War cases wherein the Supreme Court exercised jurisdiction and researched the history and traditional application of the "Law of Slavery" and vigorously enforced said law. Petitioner also relies on post Civil War cases such as the Slaughter House Cases 83 US 36, 21 L. Ed 394 (1873) and Hodges v. United States, 203 US 1, (1905) wherein the United States Supreme Court in exercise of its jurisdiction researched the history of the Law of Slavery as well as the Law of Freedom (Amendment XIII) and identified "badges and incidents of slavery" that are absolutely prohibited under the flag of the United States and within the exclusive jurisdiction of this Honorable Court. One of the cruelest incidents of slavery was the rule that a human, no matter how brutally treated by a Master was denied the freedom to seek a common law remedy and trial by jury against the Master for fair and adequate compensation for the intentional (assault and battery) injuries and dehumanization.

Petitioner's initial attorney failed to recognize that she, as well as all employees in Hawaii, are subjected to cruel and unusual punishment (intentional physical injury)–"purposeless and needless imposition of pain and suffering"–by a State of Hawaii law, which said law the State writes into every employment contract. Said attorney failed to raise the constitutional issues and subjected her to the "exclusive" Workers' Compensation Law of Hawaii. After substitution of attorneys, Petitioner raised the issues involved herein by filing her claim as preserved under the Labor Law of California. She was injured on a flight to San Francisco and she was ill in California (Appendix "C"). The two courts, Hawaii Supreme

Court and the U.S. District Court, Northern District of California exchanged letters relative to Petitioner's cases and she was subjected to urgings by her Master that she was not free to assert her rights under the California Law. A result, similar to the rule imposed in Dred Scott and Prigg was imposed on her, "Once a slave; always a slave."

After denying her oral argument, the State of Hawaii Supreme court entered a "Memorandum Opinion" denying her any relief on January 16, 1997 (Appendix "A"). A Motion for Reconsideration was timely and pointed out that the Thirteenth and Fourteenth Amendments were being violated (Appendix "G," Supporting Affidavit). On February 5 1997, an Order denying her Motion for Reconsideration was entered without a hearing. Rule 13.1 provides that this Petition must be filed by May 6, 1997.

Jurisdiction is also grounded on the fact that Amendment XIII, the Freedom Law, is not self-executing and its respect, integrity, and enforcement are vested in the Supreme Court of the United State via Amendment III.

f. CONSTITUTIONAL PROVISION
STATUTES AND RULES INVOLVED

UNITED STATES CONSTITUTION

Amendment XIII
Amendment XIV, Due Process and Equal Protection.

HAWAII REVISED STATUES (HRS)

HRS Section 386-5
HRS Section 386-6

CALIFORNIA LABOR CODE Section 3602(b) (2)

HAWAII RULE OF APPELLATE PROCEDURE (HRAP)

HRAP, Rule 35 Opinions
The above are presented in Appendix "F"

g. STATEMENT OF THE CASE

INTRODUCTION: This is a Master–Servant relationship that has been converted into a Master–Slave relationship via the laws of the State of Hawaii, Sections 386-5 and 386-6 Hawaii Revised Statutes (HRS), and Rule 35 Hawaii Rules of Appellate Procedure (Memorandum Opinion). When construed and applied together with California Labor Code Section 3602 (West 1996), this case identifies California as a "Free State" and Hawaii a "Slave State." The record demonstrates that if the Servant had been hired in California, rather than Hawaii, her freedom to protect herself from her Master's intentional foggings (spraying pesticide on her) and her common law right to trial by jury, general damages for conscious pain and suffering, special damages, punitive damages, and injunctive relief would have been preserved. She would have been as free as all of the other employees hired in California and entitled to the equal protection of the law.

BACKGROUND: The Servant was an international flight attendant who started her service in 1966. Her Master was Pan Am (Tr. 9/27/89, p.5). In 1986, Pan Am was "bought out" by United Airlines at the Servant's home port in Hawaii and said Servant, who had 19 years seniority, was continued in service by a new Master (Tr. 7/19/91, pp. 17-18). United Airlines required her to undergo a physical examination by its physician prior to entering its service. This Servant was free from any illness (R. 635, 1216-1217; Tr. 9/27/89, p. 5, and Tr. 7/18/91, p. 31; R. 1217-1218).

On the Australia and New Zealand routes of each Master, prior to permitting the employees and passengers to disembark, everyone on board was intentionally sprayed with a poison, which both Masters informed her and other employees and said passengers was not harmful to human beings (Tr. 7/18/91, p. 20). This poisoning of the employees

and passengers was performed by the Master sealing everyone in its aircraft cabins, even shutting down the air-conditioning in the aircraft, and requiring the Servants to instruct its passengers that the spray was not toxic. This poisoning of the employees and the passengers was performed by the Master intentionally assaulting and battering their exposed skin, eyes, nasal passages, lungs and other exposed areas including lips, mouths, ears, and hair for a fifteen-minute (15-minute) saturation (uninterrupted assault and battery) period (Tr. 7/18/91, p. 20).

For eighteen of her nineteen years with her prior Master (Pan Am), this Servant was able to perform her duties as demanded of her during and after these intentional poisonings without manifesting any permanent or chronic physical injury or harm from being so fogged with said poison spray (Tr. 7/18/91, p. 22). Then, in January 1985, after cabin foggings in New Zealand and Australia, this Servant began to experience feeling of disorientation, headaches, and burning in her nose, sinuses, and throat. She was seen by an allergy specialist hired by Pan Am, Arthur Neilson, M.D., on January 21, 1985 (Appendix "E" Par 5). Dr. Neilson found no stigmata of allergic disease. "He opined that Claimant's reaction to the insecticide spray was not an allergic reaction, but an irritative response of the mucus membrane of the respiratory tract and the conjunctivae" (Ibid).

On February 11, 1985, this Servant sought a consultation with George Ewing, M.D. an American Board Certified Allergist and Immunologist at Straub Clinic & Hospital, Honolulu (Tr. 7/18/91, pp. 24, 56; Tr. 9/16/91, p. 19). Dr. Ewing tested her to determine if she was sensitive to any chemicals, in particular to D-Phenothrin, the principal chemical in the spray used to fog the cabins and occupants of the airplanes. On February 14, 1985, Dr. Ewing performed a provocation-neutralization test on her. Using the pesticide from the airplane in a double-blind study, Dr. Ewing's nurse placed three droplets of the diluted pesticide under Diana

Fairechild's tongue. Diana reacted with symptoms that included rapid heart beat, shooting pains under the right ribs, burning on the tongue, headache, and anxiety. This specific test is approved by the Academy of Otolaryngic Allergy. Dr. Ewing's diagnosis was that Diana had a sensitivity to the pesticide used on the airplanes whose principal chemical was D-Phenothrin (Appendix "E" Par. 7). On May 17, 1985, Dr. Ewing cautioned her that she could develop sensitivities to other chemicals if exposures to D-Phenothrin continued. Diana avoided further exposures during her remainder of employment with Pan Am (Appendix "E" Ibid).

Diana did not lose any time from work as a result of this sensitivity to D-Phenothrin during her employment with Pan Am. Due to the fact there were no recurring symptoms and she was able to perform her duties to full capacity, she did not pursue a Workers' Compensation claim with Pan Am (Tr. 7/18/91, pp. 24-29; M.R. 5/26/89, p. 12).

The next year, 1986, United Airlines became her new Master. Even though United Airlines was fully informed of her sensitivity to the pesticide used inside the aircraft on certain routes, she was hired.

Working conditions were different with this Master (United) than with the previous Master (Pan Am). United flew DC10s, whereas Pan Am flew 747's. On the DC10s, the economy smoking section was in front of the no-smoking section. The Galley was between the economy smoking section and the first class smoking section. This Servant was required to go through a smoking section to serve anyone in the Master's plane. In addition, the Master allowed its passengers to stand around the Galley and smoke cigarettes (R. 1306). The Servant's workplace was always filled with tobacco smoke and it was very stuffy because it was the Master's standard operating procedure to reduce the air supply as a way to reduce operating costs. The procedure helped the Master to reduce the amount of fuel used and related expenses (Tr. 7/18/91, pp. 31-34; R. 1127-1129, 1280-

1281, 1242-1243). This Servant's work shifts were often in excess of eighteen (18) hours on overnight flights (R. 817-821, 1243-1244).

On August 12, 1986, on a United Airlines flight to New Zealand, the Master fogged its cabin with pesticide and this Servant and others as well as the passengers for fifteen (15) minutes. This Servant became very ill. Her immediate symptoms from this fogging in the Master's cabin included headache, body aches, and an eye condition which the Master's physician referred to as blepharitis (bugged out eye rimmed with red scaly skin) (Tr 7/18/91, pp. 35-37. See also Finding of Fact #12. Appendix "E" p. A5 thereof.). "She described them as looking like 'golf balls,' with a pus-like discharge. She also described dark circles under her eyes, and scaly skin around the eyes." Prior to August 12, 1986, she had not been fogged with this alleged "non-toxic" insecticide since January 1985 (Appendix "E" Finding of Fact #13). This was the first time she became ill while in the service of this Master (Tr. 7/18/91, p. 36).

The Servant filed for Workers' Compensation benefits and she was awarded reimbursement of medical expenses (Tr. 7/18/91, p. 36). That claim or case was never reopened.

After the New Zealand cabin-fogging injury, the Servant appeared to gradually recover because she no longer had blepharitis; however, she still experienced other symptoms including headache, conjunctivitis, chest pain, nausea and increased mucous during and immediately after all her flights which were all smoking flights, even though she and the cabins had not been fogged for the fifteen-minute saturation period (Tr. 7/18/91, pp. 44-55; M.R. 6/13/89, pp. 44-55; Appendix "E: para 17). Also, many of the cabins of the planes in which she worked had been fogged with the poison spray on the flights immediately before her flights, and thus contained residue of the chemical poison in the upholstery, carpets, and walls (Tr. 7/18/91, pp. 51). The air on all her

flights was always filled with tobacco smoke (Tr. 7/18/91, p. 34) and always had a low oxygen content.

"On December 20, 1987, on a smoking flight to San Francisco from Honolulu, Claimant flew on a plane that had just made stops in New Zealand and Australia prior to landing in Honolulu. Claimant alleged exposure to D-Phenothrin on this date." (Finding of Fact #23, Appendix "E"). The cabin of that plane had been fogged with the pesticide three times in the 24-hour period just prior to her flight (Tr. 7/18/91, pp. 53-55). She was not ill before boarding. During the flight, she experienced body aches, conjunctivitis, headache, fever and a very bad cough (Tr. 7/18/91 54-55, Tr. 9/27/89, p. 17; M,/r, 5.26.89m o, 3l /r, 1186-87). She never recovered (Tr. 7/18/91, p. 55). She continued to have flu-like symptoms for many months. She suffered backaches, burning sensations, chest pain, conjunctivitis, cough, depression, disorientation, dizziness, ear aches, gall bladder pain, headaches, memory loss, nausea, and swollen glands (M.R. Honolulu Medical Group May 5, 1989, pp. 14-15, 17; Tr. 7/18/91, pp. 55, 57; Tr. 9/25/91, pp. 22-25; Tr. 7/18/91, p. 55). She also had fevers, rashes, and open sores (Tr. 7/18/91, 55, 57). As a result of the August 1986 injury, she had become sensitive to many chemicals in addition to the original sensitivity to D-Phenothrin. After the December 1987 flight, she became completely disabled with Multiple Chemical Sensitivity (Tr. 7/18/91, pp. 55-58; M.R. 5/26/89, pp. 13-17; Tr. 9/25/91, pp. 15-19).

Dr. Ewing wrote in August 1988 that her Multiple Chemical Sensitivity (MCS) was caused by the work environment on United Airlines' aircraft. This was her first information that the disability she suffered was MCS due to the pesticide foggings. He recommended that she avoid chemicals that could aggravate her symptoms. He saw no need for further work-up or laboratory testing" (Finding of Fact No. 27, p. A9, Appendix "E"). After Dr. Ewing diagnosed her with MCS, Dr. Yuen, a psychiatrist, brought

his diagnosis of "adjustment disorder" current and diagnosed her with "organic mood syndrome." Dr. Yuen testified that he considered her emotional difficulties or mood to be a product of an organic, physical cause (Ibid, No. 29). Dr. Yuen concluded that this was a chronic and disabling illness (Tr. 9/25/91, pp. 12-25; M.R. Honolulu Medical Group, 5/26/89, pp. 13-17, 25).

On January 24, 1989, on advice of her former attorney that Hawaii law restricted her to only the benefits of Workers' Compensation (HRS Sections 386-5 and 386-6), she filed for said relief by and through said attorney (R. 5). The claim was denied on February 3, 1990 on the grounds that: 1) She sustained no injury; 2) If she did have an injury, it was an exacerbation of her chemical sensitivity while with United; and 3) Her adjustment disorder was a consequence of her original injury with Pan Am (R. 437-438).

She appealed on March 12, 1990 to the Hawaii Labor and Industrial Relations Appeals Board (HLIRAB). Hearings took place before the HILRAB on July 18, and September 16 and 25, 1991.

The Servant's treating physicians and their consultants testified that her illness was MCS and that is was caused by exposure to the pesticide poison and other toxic chemicals on United Airlines aircraft. Her medical expert witnesses were George Ewing, M.D., Gregory Yuen, M.D., Steven Plavnick, PhD., James Miller, M.D., and William Rae, M.D. (tr. 9/16/91 pp. 1-60; Tr. 9/25/91 pp. 17-18, 57-80; and R. 55, 123-127, 632-39). On November 2, 1994 (3 years after the Hearings) the HILRAB filed its Decision (Appendix "E") stating that, "We are unable to conclude that Claimant sustained an injury on December 20, 1987, as a result of exposure to D-Phenothrin at work. At most, Claimant has proven that she suffered an irritative reaction to D-Phenothrin, in the form of blepharitis and conjunctivitis, when she was exposed in 1985 and 1986. There was no

evidence that she suffered a similar reaction on December 20, 1987." (Ibid p. A16-17).

The HILIRAB rejected her treating physician's and consultants' testimony and accepted the testimony of the Master's experts. The HILRAB wrote that its members believed and accepted the "Opinions" of the Master's experts. They wrote, "We credit Dr. McDonnell's opinions." (Id p. A12). We credit Dr. Comstock's opinions." (Id p. A13). Dr. Comstock, who was presented as a "medical toxicologist" diagnosed this Servant's "current condition as an iatrogenic chemophobic anxiety reaction to chemicals" (Appendix "E" para. 38, p. A13). "latrogenic," according to Melloni's Illustrated Medical Dictionary, means: "Caused by a physician; said of an illness unwittingly induced in a patient by the physician's attitude, treatment or comment." The HILIRAB had found as a fact that "Claimant currently lives in a rural area in upcountry Maui. In order to minimize chemical exposures. Claimant leads a reclusive existence, avoiding traffic and most people." (Ibid "E" p. A10).

The Servant appealed to the Supreme Court of the State of Hawaii and the Appeal was assigned S.C. No. 18726. She discharged her attorney and retained her present one. She also retained Thomas J. Kaster, Esq. of San Francisco, California and he filed a claim in California for her, claiming rights under the California Labor Code, Section 3602. The history of that case and the grounds of jurisdiction are contained in Appendix "C," which is a copy of the ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADING, No. C-96-1775 JSB, United States District Court, Northern District of California, DIANA FAIRECHILD v. UNITED AIRLINES, ET AL., filed and entered December 20, 1996.

Before Appendix "C" was granted, Magistrate Judge Joan S. Brennan and Chief Justice of the State of Hawaii Supreme Court Ronald T.Y. Moon exchanged

communications concerning both cases. Copies of said communications are contained in Appendix "D."

Subsequently, the Federal Court (California), upon the persuasive argument of the Master's attorney, dismissed the Servant's case under the Californian Labor Code, stating "Hawaii's workers' compensation statute is the applicable law. Plaintiff's claim is barred under Hawaii's Workers' Compensation statute, which recognizes no exception for an Master's fraudulent concealment." (Appendix "C" p. 10).

Thereafter the State of Hawaii Supreme Court, after refusing to hear oral argument, issued a Memorandum Opinion (Appendix "A"). The State Supreme Court endorsed the finding of the State of Hawaii LIRAB, "that Claimant does not suffer from an injury as claimed."

Within ten days this Servant filed a Motion for Reconsideration January 27, 1997. Appendix "G," the "Supporting Affidavit" in support of the Motion for Reconsideration, points out to the State Supreme Court of Hawaii that the Hawaii Statutes and Memorandum Opinion impose upon and enforce upon the employees in Hawaii an incident of slavery and involuntary servitude, specifically, the right of the Master to intentionally whip, or otherwise physically abuse a slave with the consent and protection of the state.

On February 5, 1997, the State of Hawaii Supreme Court denied the Motion for Reconsideration (Appendix "B"). Pursuant to Rules 12 and 13. Petitioner has until May 6, 1997 in which to file this Petition.

h. HOW THE FEDERAL QUESTION WAS RAISED

The Federal Question was raised in the Supporting Affidavit, Appendix "G."

"Affiant verily believes that it was an incident of slavery and involuntary servitude for a master to intentionally whip, or otherwise physically injure a slave or peon with impunity.

"Affiant verily believes that the law of Hawaii and of the United States via the Thirteenth and Fourteenth Amendments prohibits an employer from intentionally poisoning an employee in the course of employment.

"Affiant respectfully suggests to the Court that the Memorandum Opinion in this case denies the injured employee the Equal Protection of the Law as well as liberty and property rights without due Process of Law."

The Supreme Court of Hawaii responded by an Order denying any argument or hearing on the Federal Question and denied the Motion for Reconsideration summarily.

Petitioner also raised the issues of slavery and involuntary servitude by fleeing to the State of California and seeking relief from the conditions of slavery and/or involuntary servitude impressed upon her via Hawaii law. Appendix "C" shows that the Federal Court in California followed the course of the fugitive slave laws. See Encyclopedia Britannica, "Fugitive Slave Laws, a term applied in the United States to the statutes passed in Congress in 1793 and 1850 to provide for the return of Negro slaves who escaped from one state into another or into a federal territory. . . In 1842 the U.S. Supreme Court in the case of Prigg v. Pennsylvania ruled that the state authorities could not be forced to act in fugitive slave cases, but that federal authorities must carry out the federal law. . ."

Petitioner herein had sued, as a free person, in the California State Court. The Master (Respondent herein, United Airlines) had the case removed to the USDC for the Northern District of California. The Federal Court (California) relegated this woman to the "exclusive"-slave and involuntary servitude law of Hawaii (Appendix "C"). The Hawaii Supreme Court then summarily disposed of her claim by employing the Memorandum Opinion (Appendix "A"). Once a slave; always a slave was the law of the United States in 1842, Prigg v. Pennsylvania 41 U.S. 539 (16 Peters 539) and Federal Judges vigorously enforced said law. However,

the fugitive slave law was repealed June 28, 1864. Amendment XIII. The Law of Freedom, now prohibits all judges, State and Federal, from enforcing any form of slavery or involuntary servitude upon any employee anywhere under the Flag of the United States. This Federal Question is raised sua sponte. "The state (condition) of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws" (Prigg p. 611). The Hawaii Court and the Federal Court (California) adapted the fugitive slave laws to abrogate this intentionally injured Servant's privileges and immunities.

The Court is respectfully requested to rule that the Federal Question was timely and appropriately raised.

i. STATEMENT: 28 U.S.C. SECTION 2403(a) MAY APPLY

j. REASONS WHY CERTIORARI SHOULD BE GRANTED

Slavery and involuntary servitude are concepts of law imposed upon humans by a state or a nation. The earliest tribes had slaves. slavery and involuntary servitude are not based on race, creed, national origin or sex (Hodges v. United States 203 U.S. 1 (1905)). The "Law of Slavery" predates the Talmud, the Koran, and the Holy Bible. Exodus is an historic account of the escape from the law of slavery as enforced against the tribes of Israel by the Egyptian empire. Slavery and involuntary servitude are identified by "badges and incidents" (Hodges, Ibid, p. 16).

A master flogging a servant with a whip while the servant is performing services for the master in the confines of the master's cabin has always been recognized in the United States as a brutal and cruel incident of slavery. The "Law of Slavery" is a vital part of our history and the Court is requested to take judicial notice thereof. The law of the slave

state protected the master by prohibiting the intentionally injured and dehumanized servant from not only the freedom to be free from assault and battery, but also the freedom to exercise the common law remedy of an action for damages, for pain and suffering, special and punitive damages, injunctive relief, as well as a trial by a jury of free men and women who decide whether medical expert witnesses are credible or paid hirelings of a cruel and brutal master. The fugitive slave laws required Federal Judges to enforce slavery and prevent a slave from escaping to a "Free State." (Prigg v. Pennsylvania, supra).

When a master fogs a servant with a poisonous spray for fifteen minutes while she is confined within its cabin and performing her work, that should be recognized as a form of brutal and cruel infliction of physical injury and dehumanization. Such an assault and battery is more dehumanizing that a flogging with a whip because a master uses a whip to goad a horse, mule, ox or slave to perform services. However, a master uses a poison to kill lower forms of life such as lice, mice, bats, gnats, rats and things like that, that are not his property and which he loathes.

The purpose of Amendment XIII was to forbid all shades and/or forms of slavery and involuntary servitude. (Slaughter House Cases, 83 US 36, 21 L.Ed. 394, 1873). However, Amendment XIII is not a self-executing law. When the scholars of law, labor and history accidentally or intentionally disregard the Law of Freedom (Amendment XIII) and find sophisticated legalese with which to resurrect and enforce the most cruel and brutal badges and incidents of slavery and inflict them upon the total work force of a state, it will be an obvious act of abuse of judicial discretion for the Supreme Court of the United States to deny a petition for Writ of Certiorari. The Supreme Court will be refusing to enforce the Law of Freedom (Amendment XIII) with the same vigor traditionally employed to enforce the Law of Slavery.

It is respectfully submitted that this petition is also a request that the Court exercise its constitutional authority under Article III, as well as a petition to the discretion of the Court. The Court should take this case because slavery and involuntary servitude are absolutely prohibited everywhere under the jurisdiction of this Honorable Court.

> "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." (Amendment XIII)

It is respectfully pointed out that there is no other power on earth that can respect and enforce this absolute prohibition if the Justices of this Honorable Court reject this petition.

This absolute prohibition is a vital part of the heritage, culture, tradition and history of the United States. This absolute prohibition is the most prominent feature with which we face the entire world.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Amendment XIV).

All persons look to the Supreme Court of the United States for scholarly instruction as to how to prevent applications of law that are so sophisticated they convert an ordinary master–servant relationship into a brutal form of slavery. Certiorari should issue because the record demonstrates that the state lawmakers, judges, and other enforcers have resurrected said brutal forms without reason, need or justification, and with apparent heedlessness.

Employers do not need a protected right to flog, poison, rape, or brutalize any employee. In Hawaii, as elsewhere, masters do not hire a servant and pay that servant wages so as to have the right to flog, poison, rape, or brutalize said servant in the course of employment. Servants in Hawaii do not contract and agree to have the master flog, poison, rape or brutalize them for wages. It is the state who imposes this form of slavery and/or involuntary servitude upon all employees in Hawaii. See HRS Section 386-5: Exclusiveness of right of compensation and HRS Section 386-6: Territorial applicability. "If an employee who has been hired in the State (Hawaii) suffers work injury, he shall be entitled to compensation under this chapter even though the injury was sustained without the State. The right to compensation shall exclude all other liability of the employer for damages as provided in Section 386-5. ALL CONTRACTS OF HIRE OF EMPLOYEES MADE WITHIN THE STATE SHALL BE DEEMED TO INCLUDE AN AGREEMENT TO THAT EFFECT." (Emphasis added)

The aforesaid words are the bonds of slavery and involuntary servitude that give the master the right to intentionally injure the servant, provided the master pays the dreadfully injured servant two-thirds base pay plus out-of-pocket needed medical services.

Such brutality caused the women of Hawaii to protest and in 1992 the bonds of slavery and involuntary servitude in HRS Section 386-5 that gave the master a protected right of "sexual harassment, sexual assault, and infliction of emotional distress and invasion of privacy" were cut away. Unfortunately, the women and the scholars of law, history and labor failed to recognize that sexual harassment, rape, infliction of emotional distress (dehumanization) and invasion of privacy are some of the less brutal incidents of slavery and involuntary servitude.

Obviously, the law makers, enforcers and interpreters of the law of the state need the assistance of the Supreme Court

of the United States. Hawaii needs the help and understanding of this Honorable Court via a Writ of Certiorari.

The record also demonstrates that the entire nation needs to have a Writ of Certiorari issue in this case. The record shows that this servant tried to escape the bondage imposed upon her via HRS Sections 386-5 and 386-6. She has a work-connection with the state of California. She was treated for her injuries in California. California is a free state in that its workers' compensation law, California Labor Code Section 3602 (b) (1) and (2), provides freedom for the servant to protect herself (himself) according to the common law and Amendments XIII and XIV. The California law provides:

> "(b) An employee, or his or her dependents in the event of death, may bring an action at law for damages against the employer, as if this division did not apply, in the following instances:
>
> (1) Where the employee's injury or death is proximately caused by a willful physical assault by the employer.
>
> (2) Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer."

The servant, Petitioner herein, filed an action in California against the master (United Airlines, et al) February 27, 1996 claiming a violation of California Labor Code. See Appendix "C," Diana Fairechild v. United Airlines, et al., No. C-96-1775 JSB, United States District Court, Northern District of California.

The California (Federal) Court and the Hawaii Supreme Court exchanged communications concerning the case.

(Appendix "D") The Hawaii Supreme Court denied the Servant oral argument on the appeal, the California Court denied the Servant the freedom to use the California Labor Code and sent the servant back to Hawaii by determining that the servant had no rights under the California Labor Code, and then the Hawaii Supreme Court disposed of the servant's claims via a Memorandum Opinion pursuant to Hawaii Rules of Civil Procedure, Rule 35.

A Memorandum Opinion is not a precedent. It cannot be cited as law in any subsequent case. In this case, it can be compared with the act of the slaver closing the master's cabin door and keeping the moans and cries of the flogged (fogged with poison) human inside and protecting the master from being properly and lawfully charged with an action for assault and battery, intentional infliction of emotional harm (a most outrageous dehumanization), and sued by the human for damages for pain and suffering, special damages, punitive damages and injunctive relief. The Memorandum Opinion also prevents the servant from ever having the people via a civil trial by jury determine all of the facts and the amount of the verdict. The master purchases expert opinions that the dreadfully injured human was not injured by the poisonous foggings, although her treating physicians swear she was permanently so injured.

Copies of the communications between the Courts are presented in Appendix "D." In substance and effect the free state of California, via the Federal District Court, and the slave state of Hawaii devised a kind of fugitive slave act that brings the sophistry and legalese found in Dred Scott v. Sanford and Prigg v. Pennsylvania into the 21st Century.

With all due respect to the Courts, and officials involved, it appears obvious that all of the states, their institutions, and people need the scholarly assistance of the Supreme Court of the United Stated to restore the integrity of Amendments XIII and XIV of the Constitution of the United States, and bestow the blessing of liberty upon this employee and all employees,

and therefore, a Writ of Certiorari to the Supreme Court of the State of Hawaii should be granted.

Dates: Honolulu, Hawaii April 27, 1997

Respectfully submitted

JOSEPH A. RYAN
Attorney for Diana Fairechild,
Petitioner

Supreme Court, U.S.
FILED

97.178 APR 30 1997

OFFICE OF THE CLERK

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

DIANA FAIRECHILD,
Petitioner,

v.

UNITED AIRLINES, INC. AND
PACIFIC INSURANCE COMPANY, LTD.,
Respondents

On Petition for Writ of Certiorari to the
Supreme Court of the State of Hawaii

APPENDIX

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Attorney for Petitioner,
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APPENDIX

APPENDIX "A"... MEMORANDUM OPINION, January 16, 1997, in NO. 18726, in the Supreme Court of the State of Hawaii, DIANA FAIRECHILD, Claimant-Appellant vs. UNITED AIRLINES, INC., Employer-Appellee, Self-Insured, and PACIFIC INSURANCE COMPANY, Insurance Adjuster, Appellee.

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APPENDIX "B"... ORDER, February 5,1997, in No. 18726, in the Supreme Court of the State of Hawaii in Fairechild vs. United Airlines, Inc/Pacific insurance Company, supra, DENYING Diana Fairechild's motion for reconsideration filed on January 27,1997.

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APPENDIX "C"... ORDER GRANTING DEFENDANTS: MOTION FOR JUDGMENT ON THE PLEADINGS, December 23,1996, in NO. C-96-1775 JSB, in the United States District Court Northern District of California in DIANA FAIRECHILD, PLAINTIFF, v. UNITED AIRLINES, et.al., Defendant and filed with the Supreme Court of the Stsate of Hawaii in Fairechild's Motion for Reconsideration on January 27,1997 as Exhibit "A" thereto.

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APPENDIX "D"... COPIES OF COMMUNICATIONS BETWEEN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA AND THE SUPREME COURT OF THE STATE OF HAWAII and concerning Fairechild v. United Airlines, Inc., and Pacific Insurance Company prior to the dispositon

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of both cases in the respective Courts.

(1)..Copy of letter of November 4, 1996 from Honorable Joan S. Brennan, United States Magistrate Judge, U.S. District Court Northern District of California to the Honorable Ronald T y.Moon, Chief Justice, Supreme Court of Hawaii; Re: Fairechild b. United Airlines, et al. Hawaii Supreme Court No.18726; and related California action. Fairechild v. United Airlines, U.S.D.C No.C-96-1775-JSB.

(2).. Copy of letter of November 26, 1996 from the Supreme Court of Hawaii to the U.S District Court in response to Appendix "D" (1) and executed by Ronald T.Y. Moon, Chief Justice.

(3)..Copy of letter of December 3, 1996 from the U.S.D.C Northern District of California to the Supreme Court of the State of Hawaii in reply to Appendix "D" (2) and executed by Joan S. Bennett, United States Magistrate Judge (USDC_NDCA).

APPENDIX "E"...DECISION AND ORDER, November 2, 1994, of the LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD of the STATE OF HAWAII, Case No. AB 90-182 (2-89-02035) Diana Fairechild, Claimant-Appellant vs. United Airlines, Inc., and Pacific Insurance Company, Ltd., Employer/ Insurance Carrier-Appellee.

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APPENDIX "F"...CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.
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APPENDIX "G"..."G" SUPPORTING AFFIDAVIT to Motin for Reconsideration, January 27,1997
P. 70-72

Filed 1/16/97

NO. 18726

IN THE SUPREME COURT OF THE STATE OF HAWAII

DIANA FAIRECHILD, Claimant-Appellant, vs. UNITED AIRLINES, INC., Employer-Appellee, Self-Insured, and PACIFIC INSURANCE COMPANY, Insurance Adjuster-Appellee.	CASE NO. AB 90-182 (2-89-02035) APPEAL FROM DICISION AND ORDER FILED NOVEMBER 2, 1994 AND ORDER DENYING CLAIMANT-APPELLANT'S MOTION FOR RECONSIDERATION AND REOPENING OF DECISION OR [SIC] ORDER FILED JANUARY 19,1995 BY THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

MEMORANDUM OPINION

Claimant-Appellant Diana Fairchild (Claimant) appeals the decision and order of the Labor Industrial Relations Appeals Board (LIRAB) denying compensation for "Multiple Chemical Sensitivity" (MCS) allegedly caused by her employment with Employer-Appellee United Airlines, Inc.(Employer).[1] Claimant apparently makes three arguments on appeal: (1) the LIRAB erred in concluding that the presumption of compensability does not apply; (2) the LIRAB's finding that Claimant did not suffer from the claimed injury was clearly erroneous; and (3) the LIRAB abused its discretion

[1] Employer and Insurance Adjuster-Appellee Pacific Insurance Company (Insurance Adjuster) will be collectively referred to as Appellees.

in denying Claimant's request to reopen the case to receive new evidence. For the following reasons, we affirm the LIRAB's decision and order.

I. BACKGROUND

Claimant worked as a flight attendant for Pan American World Airways (Pan Am) from 1966 to 1986. On two of her regular routes, Australia and New Zealand, local government policy required performance of a procedure known as "disinsection" before passengers and crew could disembark from arriving aricraft. During this procedure, the interior of the aircraft was sprayed with the pesticide D-phenothrin. Claimant was exposed to the pesticide every time she flew on these routes.

In January 1985, Claimant complained of an adverse reaction on a flight to New Zealand. She experience eye irritation, headaches, disorientation, and burning sensation in her nose, sinuses, and throat. Upon returning to Honolulu, she was examined by a physician who concluded that her reaction was an irritative response of the mucus membranes of her respiratory tract rather than an allergic reaction.

In February 1985, Claimant was examined by George Ewing, M.D., a specialist in allergy and immunology. Dr. Ewing administered a provocation-neutralization test using samples

of D-phenothrin supplied by Claimant. This test involves placing a diluted sample of the substance under the patient's tongue. A positive response consists of various subjective reactions. In Claimant's case, she experience shooting pains, pressure, itching, rapid heart-beat, and anxiety. A second dose produced a burning sensation in her mouth, headache, and pressure behind her right breast. Dr. Ewing diagnosed a chemical sensitivity to D-phenothrin. Later, Dr. Ewing cautioned Claimant that she could ultimately develop sensitivities to other chemicals if she continued to be exposed to pesticides.

In February 1986, Pan Am went out of business and its routes were taken oven by Employer. Claimant was hired by and began working for Employer.

In August 1986, during a lay-over in New Zealand, Claimant experience eye irritation, with dark circles and scally skin under her eyes. A doctor in New Zealand perscribed antibiotic drops and cream. Upon returning to Honolulu, another doctor diagnosed blepharitis (inflammation of the eyelids) and prescribed more medication. Employer did not dispute Claimant's workers' compensation claim for the eye irritation and paid her medical expenses.

In September 1986, after flights to Tokyo

and New York, Claimant again experienced eye problems. Although aircraft arriving in Tokyo and New York were not subjected to disinsection, Claimant asserts that her reaction was caused by pesticides residue on the carpeting and upholstery of the aircraft.

On November 26,1986, Claimant began treatment with Gregory Yuen, M.D., a psychiartrist Claimant had been having difficulty making the transition to her new employer. She was upset with the possible loss of her seniority form Pan Am, criticized her union for not adequately addressing her concerns, disliked Employer's uniforms, complained of the poor circulation in Employer's aircraft, and had difficulty learning new work procedures and getting along with her new co-workers. In addition, she had been experiencing problems in her personal and family relationships. Dr. Yuen arrived at a dignosis of "adjustment disorder with mixed emotional features." While undergoing treatment with Dr. Yuen, Claimant received a poor evaluation for various incidents, including violation of FAA rules.

On December 20, 1987, Claimant experienced another reaction on a flight to San Francisco. She complained of body ache, conjunctivitis, headaches, fever and respiratory illness.

Although Claimant had not been subjected to disinsection on the flight to San Francisco, the aircraft had made stops in New Zealand and Australia prior to stopping in Honolulu. Claimant asserts that it was during this flight that she sustained a work injury and became disables with MCS.

Following the December 20 flight, Claimant continued to complain of flu-like symptoms, including backaches, burning sensations, chest pain, conjunctivitis, coughs, depression, disorientation, dizziness, ear aches, fever, gall bladder pain, headaches, memory loss, nausea, skin sores, swollen glands, rashes, confusion and fatigue.

On Audjust 11,1988, Claimant returned to Dr. Ewing for another examination. She complained of intolerance to all antibiotics, sulfa drugs, penicillin, house dust, newsprint, tobacco smoke, perfumes, powders, insecticides, jet fuel, hair sprays, carpets, dairy products, chemical deodorants, and synthetic fibers. Based on Claimant's history, Dr. Ewing diagnosed her with MCS. He recommended avoidance of chemicals that could aggravate her condition. After consulting with Dr.Ewing, Dr. Yuen changed his psychiatric diagnosis to "organic mood syndrome" caused by her chronic MCS.

On January 24, 1989, Claimant filed the instant workers' compensation claim. Claimant asserted that she had developed MCS as a result of exposure to D-Phenothrin at work. She claimed that the exposure on December 20,1987 had caused her to become sensitive to other non-related chemical in the environment.

On September 27, 1990, a hearing was held by the Department of Labor and Industrial Relations, Disability Compensation Division (DCD). On February 23, 1990, the DCD denied Claimant compensation. Claimant then appealed to the LIRAB.

The LIRAB held hearing on July 18, September 16, and September 25, 1991. At the hearings, various witnesses testified; however, the testimony of the expert witness is most relevant to the present appeal.

Dr. Ewing, Claimant's treating physician and former chief of the allergy and immunolohy department of Sraub Clinic and Hospital, testified in favor of Claimant. Dr. Ewing testified the MCS begins with a large exposure to a particular chemical, which sets the state so that subsequent exposures to that chemical or other related or even unrelated chemicals continue to stimulate symptoms in the patient. The symptoms progressively increase even with exposure to lower levels of the chemicals. The symptoms include dizziness, headache, aches and

pains, difficulty in thinking, and other central nervous system problems. Dr. Ewing admitted that there is no specific immunologic test to determine if a patient suffers from MCS. He stated that diagnosis of MCS is accomplished through examination of the cause and effect relationship between exposure and the patient's reactions. He noted that the diagnosis is often made by exclusion, when physical examination fails to find any other cause. Dr. Ewing further testified that he diagnosed Claimant with MCS based on her history and the results of her provocation-neutralizition test. However, on cross-examination he admitted that, because he did not definitely say whether he had tested her with placebos. He further admitted that not only did he believe MCS had sensitized Claimant to a multitude of chemicals, but that it had also sensitized her to high-voltage electromagnetic fields.

Claimant also presented Steven Plavnick, Ph.D.,[2] over Appellees' objections. Dr. Plavnick professes to be an expert on "environmental illness," i.e., MCS. He was originally a patient of Dr. Theron Randolph, the founder of a school of thought known as

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[2]Dr. Plavnick is neither a medical doctor nor a psychologist; rather, his doctorate is education.

"clinical ecology," which recognizes and treats MCS. Dr. Plavnick lived with Dr. Randolph and his associates for six weeks, receiving treatment and studying Dr. Randolph's teachings. Dr. Plavnick then founded his own firm, Solutions to Living Problems, Inc., which apparently advises MCS sufferers on how to adjust their lifestyles to deal with their condition. Dr. Plavnick testified that environmental illness or MCS is "a individual's inability to tolerate some or many of the environmental chemicals is frequent use within their biospace of their immediate environment." He testified that MCS is also known as "Epstein-Barr syndrome" and "chronic fatigue syndrome." He further noted that many federal agencies have recongized MCS, including the Social Security Administration, the Department of Housing and Urban Development, the Enviromental Protection Agency, as well as state agencies in other jurisdictions.

Appellees presented John McDonnell, M.D. former chief of the allergy and immunology department of Tripler Army Medical Center and former president of the Hawai'i Medical Association. Dr. McDonnell testified:

It is my opinion that the multiple chemical sensitivity or environmental illness is a philosophy that is written extensively in lay literature similar to check-out newspaper literature that is completely unsupported in

fact and is nothing more than an unsubstantiated philosophy.

I would like to further add that the most significant feature of claimants in support of the enviromental illness concept seems to completely skirt the scientific method and do not challenge scientifically claims made by proponents. They seem to accept everything and anything that a claimant might have and then argue in circular arguments, substantiating virtually anything that could be claimed.

About Dr. Ewing, Dr. McDonnell stated:

> Dr. Ewing...has persisted in championing this belief in clinical ecology with almost religious zeal, contrary to all evidence to the contrary substantiated by numerous scientific studies and evaluations by many academics, including the California Medical Association, the American Academy of Allergy and Immunology, and on and on.

Dr. McDonnell criticized the methodology used by proponents of MCS. He noted:

> In this particular illness or philosophy --I don't consider it a science--the patients present an illness and already have an explanation. Now. many times they don't have an explanation but the explanation almost invariably seems to be that of someone else's fault that then makes these people victims and they can then explain all other inadequacies in their life based on this situation of having been victims.
>
> The difference her is that in environmental illness, the patient's associations are accepted as fact, when, in point of fact, in allergy and immunology, most patients come in with an idea that something is bothering them and it turns out not to be the case.

Dr. McDonnell also criticized the provocation-neutralization test. He noted that it is not

a scientifically reproducible test. The test relies on subjective responses from the patient, rather than objective responses as in conventional allergy test. Therefore, the test results can be affected by the biases of the patient. Furthermore, Dr. McDonnell criticized the manner in which Dr. Ewing administered the test to Claimant. Because the test was not conducted as a double-blind study,[3] the biases of the person administering the test, i.e., Dr. Ewing, could have affected the results. In addition, because nothing was done to mask the taste of the pesticide sample, Claimant could have been able to distinguish the pesticide from placebo based on taste, thus leading to her subjective reactions. Dr. McDonnell finally stated that he believed Claimant suffered from no injury at all.

Appellees also called Eric Comstock, M.D., a medical toxicologist, as a witness. Dr. Comstock testified:

> My opinion of the concept of environmental illness, the basic premise of environmental illness--and I equate this to clinical ecology --is that--that it is more of a belief system than it is a dynamic of--of body interaction or of a disease process.

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3. In a double-blind study, neither the test subject nor the test administrator know whether any given dose is the actual substance or a placebo.

Dr. Comstock stated that clinical ecologists attempt to treat MCS with so-called avoidance therapy by advising the patient to avoid exposure to chemicals in their environment. However, Dr. Comstock noted that the human body contains and produces its own chemicals and that, for this reason it, it is impossible to completely avoid chemicals. Furthermore, Dr. Comstock diagnosed Claimant's condition as an "iatrogenic chemophobic anxiety reaction." In Dr. Comstock's view, Claimant suffered from a fear of chemicals, induced by her physician's diagnosis of MCS, which in turn pricipitated ;anxiety attacks. Dr. Comstock finally stated that, in his opinion, Claimant had sustained no organic injury.

On April 30,1993, Claimant filed a motion to reopen the evidentiary portion of the case. The LIRAB denied the motion on May 25,1993. Claimant filed another motion to reopen the evidentiary portion of the case on September 13, 1994. On September 20, 1994, the LIRAB held a hearing on the motion and then denied it on the same date.

On November 2, 1994, the LIRAB filed its decision and order denying Claimant compensation. In its findings of fact (FOFs), the LIRAB found that Claimant did not suffer from an injury as claimed. In FOF No. 37,

the LIRAB summarized Dr. McDonnell's testimony and entered the following finding: "[Dr. McDonnell] opined...that Claimant did not suffer any organic injury from exposure to insecticide beyond that of eye irritation. We credit Dr. McDonnell's opinion." In FOF No, 38, the LIRAB summarized Dr. Comstock's testimony and entered the following findings: "[Dr. Comstock] opined...that CLaimant does not currently suffer from any organic illness as a result of her chemical exposure at work ...We credit Dr. Comstock's opinions." Thus, the LIRAB found that Claimant did not suffer from the claimed injury: "On the record before us, we [find] that the claimed injury has not been established due to the lack of reliable or proven medical or scientific basis to support or confirm the diagnosis of MCS." [4] Based on its FOFs, the LIRAB entered the following COLs: "Accordingly, having [found] that Claimant has failed to establish the injury for which she claims compensation, we

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4. We note that this statement is an implicit FOF buried within the conclusion of law (COL) section of the LIRAB's decision and order. Even if a FOF is denominated a COL, it is still a FOF and must be reviewed under the clearly erroneous standard. Bumanglag v. Oahu Sugar Co., Ltd. 78 Hawai'i 275, 278 n. 2d 468, 471 n. 2 (1995) (citing Molokai Village Dev. Co., Ltd. V. Kauai Elec. Co. Ltd., 60 Haw. 582, 593 P.2d 375 (1979).

are unable to conclude that Claimant sustained an unjury on December 20, 1987, as a result of exposure to D-phenothrin at work." Therefore "[w]e conclude that Claimant did not sustain an injury on December 20, 1987, arising out of and in the course of employment."

Claimant then filed a motion to reconsider and reopen the decision on December 1, 1994. The LIRAB denied the motion on January 19,1994. On February 9, 1995, Claimant filed a notice of appeal to this court.[5]

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[5] Claimant's notice of appeal states that she is appealing pursuant to HRS§ 386-88. However, because Claimant filed a motion to reconsider and reopen prior to filing the notice of appeal, HTS §386-88 must be read in conjunction with HRS §386-87. HRS §386-87 provides that a party may move to reopen the case within 30 days of the decision and order. HRS § 386-87 (d) (1993). If the motion is denied, "the time to initiate judicial review shall run from the date of mailing of the denial decision." Id. In other words, a timely motion to reopen under HRS §386-87 tolls the period in which to appeal under HRS §386-88. The period in which to appeal under HRS § 386-88 is 30 days. HRS § 386-88 (1993).

In the present case, November 2, 1994 is the date of the decision and order. The motion for reconsideration and reopening was filed on December 1, 1994 and was therefor timely. The motion was denied on January 19,1995 and the notice of appeal was filed on February 9, 1995. Therefore, this appeal is timely.

II. STANDARD OF REVIEW

In reviewing decisions of the LIRAB, the standard of review is determined by HRS §91-14(g), which provides:

> Upon review of the record the court may affirm the decision of agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

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5 continued

We further note that nothing in HRS §386-87 indicates that judicial review after denial of a motion to reopen is limited only to the denial of the motion itself and cannot address the underlying decision and order. In construing statutes, the fundamental starting point is the language of the statute itself. State v. Taoyomura, 80 Hawai'i 8, 18, 904 P2d 893, 903 (1995). Where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning. Id. Therefore, we hold that a party whose timely motion to reopen is denied can then appeal not only the denial of the motion, but the underlying decision and order as well.

In the present case, Claimant's notice of appeal states that she is appealing "from the Order Denying Claimant-appellant['s] Motion

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(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

HRS § 91-14(g) (1993). This court has interpreted HRS § 91-14(g) to mean that:

[C]onclusions of law are reviewed under subsections (1), (2), and (4); questions regarding procedural defects are reviewed under subsection (3); findings of fact are reviewable under subsection (5); and an agency's exercise of discretion is reviewable under subsection (6).

ZEMIS V. SCI Contractors, Inc., 80 Haw.442, 445, 911 P. 2d 77 (1966) (citing Loui v. Board of Medical Examiners, 78 Haw. 21, 25, 889 P.2d 705, 709 (1995, Furthermore:

[A]ppeals taken from findings [of fact] set forth in decisions of the Board are reviewed under clearly erroneous standard. Thus, the court considers whether such a finding is [c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.] The clearly erroneous standard requires this court to sustain the Board's findings unless the court is left with a firm and definite conviction that a mistake has been made.

A conclusion of law...is not binding on an appellate court and is freely reviewable for its correctness. Thus, this court reviews [conclusions of law] de novo, under the right/wrong standard.

Atchley v. Bank of Hawai'i, 80 Haw. 239,242, 909 P.2d 567, 570 (1996) (quoting Bumanglag v. Oahu Sugar Co.,Ltd., 78 Haw. 275,279, 892 P.2d 468, 472(1995)). A court or agency

abuses its discretion "when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." Bettencourt v. Bettencourt, 80 Haw. 225,231, 909 P. 2d 553,559 (1995)(quoting Kaneohe Bay Cruises, Inc. v. Hirata, 75 Haw. 250, 251, 861 P.2d 1,3 (1993)).

III. DISCUSSION

HRS § 386-3 provides in relevant part:

> Injuries covered. If an employee suffers personal injury either by accident arising out of and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment the employee's employer or the special compensation fund shall pay compensation to the employee or the employee's dependents as hereinafter provided.

HRS § 386-3 (1993). Claimant asserts that she should receive compensation because she suffers from an "injury", namely, MCS.

A. Whether the LIRAB Erred in Concluding that the Presumption of Compensability Does Not Apply

Although Claimant's argument is not a model of clarity, she appears to argue that the statutory presumption of compensability requires that all doubts on questions of fact be resolved in favor of the claimant.

HRS § 386-85 provides in relevant part: "Presumptions. In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary: (1) That the claim is for a covered work injury[.]" HRS § 386-85 (1993). Claimant cites a numb er of our cases for the proposition that the presumption applies to the factual determination of whether an injury exista: Akamine v. Hawaiian Packing & Crating Co.,53 Haw. 406, 495 P.2d 1164 (1972); DeFries v. Assoc. of Owners, 57 Haw. 296, 555 P.2d 855 (1976); Accoustic, Insulation and Drywall, Inc. v. Labor & Indus. Relations Appeal Bd. 51 Haw. 312, 459 P. 2d 541 (1969), reh'g denied, 51 Haw. 632, 466 P.2d 439 (1970); and Lawhead v. United Airlines, 59 Haw. 551, 584 P.2d 119 (1978). Claimant quotes the following statement from Akamine: "The beneficient and liberal purposes of the statute require that doubts be resolved in favor of the claimant." Akamine 53 Haw. at 414, 495 P.2d at 1169. Claimant argues that in the present case, even though there was doubt as to whether Claimant actually suffered from the claimed injury, the

presumption of compensability required the LIRAB to find in favor of Claimant.

The LIARB, in its decision and order, concluded that the presumption does not apply to this case. The LIARB held:

"[A] claimant may not avail himself[of] the statutory presumption that an injury arose from employment, unless the injury or evidence is of such has first been established ...Therefore, before we can even apply the presumption to determine causation in this case, we must first determine whether Claimant has an injury." We agree with the LIARB. In all of the cases cited by Claimant, the presumption was applied to the issue of whether the injury was work-related, not to the issue of whether the injury existed at all. For example, the claimant in Akamine suffered a heart attack at work and died. Akamine, 53 Haw. at 407, 495 P. 2d at 1164. The presumption was applied to resolve the question of whether the injury was work-related. Insofar as the claimant actually died, it is clear that the presumption was not applied to the issue of whether the injury existed. In fact, Akamine expressly states, in a passage that Claimant herself quotes in her briefs, that "if there is a reasonable doubt as to whether an injury

is work-connected, the humanitarian nature of the statute demands that doubt be resolved in favor of the claimant." Akamine, 53 Haw. at 409, 495 P.2d at 1166 (emphasis added).

Therefore, in the present case, the HRS § 386-85 presumption does not apply. The LIARB first had to make the factual determination as to whether Claimant suffered from an injury as claimed.

B. WHETHER THE LIARB'S FINDING THAT CLAIMANT DID NOT SUFFER FROM THE CLAIMED INJURY WAS CLEARLY ERRONEOUS.

Claimant argues that the LIARB's finding that Claimant did not suffer from the claimed injury was clearly erroneous. We disagree.

In cases of conflicting evidence, the credibility of the witnesses and the weight to be given to their testimony are within the province of the finder of fact and will not generlly be disturbed on appeal. Carlos v. MTL, Inc., 77 Haw. 269, 276, 883 P.2d 691,698 (App. 1994) (citing Amfac, Inc. v. Waikiki Beachcomber Investment Co.,74 Haw. 85,117-18 839 P.2d 10,28, reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992)).

The evidence presented to the LIARB was highly conflicting. Drs. Ewing and Plavnick essentially testified that MCS is an organic

disease and that Claimant suffered from an injury. On the other hand, Drs. McDonnell and Comstock testified that MCS is not an organic disease and that Claimant did not suffer from an injury as claimed. The LIARB found Drs. McDonnell and Comstock to be more credible and gave their testimony more weight in the factual determination at issue in this case. The LIARB apparently credited Dr. McDonnell's testimony that clinical ecologists "seem to accept everything and anything that a claimant might have and then argue in circular arguments, substantiating virtually anything that could be claimed." The LIARB clearly did not find Dr. Ewing's testimony credible in that [t]he diagnostic methods and treatment of MCS, which Dr. Ewing subscribes to and used in this case, have not been proven to be reliable, effective, or scientifically valid." Thus, the LIARB found that Claimant does not suffer from an injury as claimed.

As an appellate court, we can overturn the LIARB's finding only if we are left with a firm and definite conviction that a mistake has been made. We are not left with such a conviction. There appears to be no consensus within the medical community on MCS; thus, we cannot say that we are left with a firm and definite conviction that MCS is an organic disease and

that Claimant has an injury as claimed. We refuse to disturb the factual findings of the LIARB.[6]

Therefore, the LIARB's finding that Claimant did not suffer from the claimed injury was not clearly erroneous.[7]

C. WHETHER THE LIARB ABUSED ITS DISCRETION IN DENYING CLAIMANT'S REQUESTS TO REOPEN THE CASE TO RECEIVE NEW EVIDENCE

Claimant made three attempts to reopen the case to receive new evidence. She filed a motic motion to reopen the evidentiary portion of the case on April 30, 1993; a second motion to reopen the evidentiary portion of the case on September 13, 1994; and a motion to reconsider and reopen the decision on December 1, 1994. The LIARB denied all three motions. Claimant argues that the LIARB abused its discretion because "the field of enviornmental illness is subject to rapid development, and it would benefit the interest of justice to receive valuable documentation which was not available during the discovery period."

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6 Claimant also argues that the LIARB found in FOF No. 31, Claimant denies suffering from a psychological injury and, therefore, did not make a claim for psychological injury. Consequently, this opinion does not address whether MCS qualifies as a psychological injury or whether the claim in the present case would be compensable as a psychological injury. This opinion only addresses Claimant's contention that MCS is an organic disease.

The LIARB has very broad discretion in admitting evidence. Hawai'i Administrative Rules (HAR) § 12-47-41 provides:

> Rules of Evidence. The board shall not be bound by statutory and common law rules relating to the admission or rejection of evidence. The board may exercise its own discretion in these matter, limited only by considerations of relevancy, materiality, and repetition, by the rules of privilege recognized by law, and with a view to securing a just, speedy, and inexpensive determination of the proceedings.

Both Claimant and Appellees cite Bank of Honolulu v. Davids, 6 Haw App. 25, 709 P.2d 613 (1985), asserting that a three-factor test should be applied when deciding whether a new

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7 Courts in other jurisdictions have also refused to disturb administrative decisions denying compensation for MCS. See, e.g., Weekly v. Industrial Comm'n, 615 N.E. 2d 59 (Ill. App. Ct. 1993); Conradt v. Mt. Carmel School, 539 N.W. 2d 713 (Wis. Ct. App. 1995). But see Armstrong v. City of Wichita, 907 P. 2d 923 (Kan.Ct.App.1995); Appeal of Kehoe, 648 A 2d 472 (N.H. 1994) appeal after remand, No. 95-316, 1996 WL 655656 (N.H. Nov.13,1996).

We also note that, as the LIRAB found in FOF No. 31, Claimant denies suffering from a psychological injury and, therefore, did not make a claim for psychological injury. Consequently, this opinion does not address whether MCS qualifies as a psychological injury or whether the claim in the present case would be compensable as a psychological injury. This opinion only addresses Claimant's contention that MCS is an organic disease.

trial should be granted based on newly discovered evidence.[8] However, the present case involves the reopening of an administrative proceeding by the LIRAB, not the granting of a new trial by a trial court. HAR § 12-47-41 expressly states that, unlike a trial court, the LIARB is not bound by statutory and common law rules regarding the admission or rejection of evidence. Therefore, we will not apply the Davids test to the present case.

According to the text of HAR § 12-47-41, in admitting or rejecting evidence, the LIARB is bound only by considerations of relevancy, materiality, and repetition, and should seek the just, speedy, and inexpensive determination of the proceedings. Claimant submitted memoranda in support of her motions and attached the actual exhibits that she sought to introduce into the record. For the most part, these exhibits consist of articles from various popular magazines that summarize the debate over MCS. The exhibits also include

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8 In Davids, the Intermediate Court of Appeals (ICA) listed the following factors: (1) The evidence must be previously undiscovered even though due diligence was exercised; (2) The evidence must be admissible and credible; and (3) The evidence must be of such a material and controlling nature as will probably change the outcome and not merely cumulative or tending onlu to impeach or contradict a witness.
Davids, 6 Haw App. at 33, 709 P.2d at 620

correspondence with elected officials, newsletters from activist organizations, and videotapes of television news programs.

Having reviewed the exhibits submitted by by Claimant, we believe they add little or nothing to the case. The exhibits may indeed be "new" in the sense that they did not exist at the time of the LIARB hearings. However, they are also repetitious. The expert witnesses at the hearings more than adequately described the dispute over the validity of MCS. Thesupplementary exhibits submitted by Claimant do nothing more thanrepeat the information in the testimonyof the expert witnesses. Because these exhibits were merely cumulative, non-expert recapitulations of the views advanced by the expert witnesses, it is highly unlikely that they would have affected the outcome of the case. Furthermore, allowing the Claimant to repeatedly reopen the case and submit new exhibits would have impaired the speedy determination of the proceedings.

IV CONCLUSION

Accordingly, we affirm the LIARB's decision and order denying compensation to Claimant.

DATED: Honolulu, Hawai'i January 16,1997.

Signed:
RONALD T.Y. MOON
ROBERT G. KLEIN
STEVEN H.LEVINSON
PAULA A NAKAYAMA
MARIO R. RAMIL

On the briefs:
Teresa Tico and Joseph Ryan
for Claimant-appellant

Roland Q. F. Thom and
Laurie E. Keeno
for employer-appellee,
self-insured, and insurance
adjuster-appellee

NO. 18726

IN THE SUPREME COURT OF THE STATE OF HAWAII

DIANA FAIRECHILD, Claimant-Appellant, vs. UNITED AIRLINES, INC., Employer-Appellee, Self-Insured, and PACIFIC INSURANCE COMPANY, Insurance Adjuster- Appellee.	CASE NO. AB 90-182 (2-89-02035) APPEAL FROM DICISION AND ORDER FILED NOVEMBER 2, 1994 AND ORDER DENYING CLAIMANT-APPELLANT'S MOTION FOR RECONSIDERATION AND REOPENING OF DECISION OR [SIC] ORDER FILED JANUARY 19,1995 BY THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

ORDER

Upon consideration of claimant-appellant's motion for reconsideration filed on Jan. 27, 1997,

IT IS HEREBY ORDERED that the motion is denied.

DATED: Honolulu, Hawaii, February 5, 1997.

Signed:

RONALD Y.T. MOON
ROBERT G. KLEIN
STEVEN H LEVINSON
PAULA A NAKAYAMA
MARIO R. RAMIL

Teresa Tico and
Joseph Ryan on
the motion.

FILED DEC. 20, 1996
Richard W. Wieking
Clerk, U.S. District Court
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DIANA FAIRECHILD Plaintiff, v. UNITED AIRLINES, et al Defendants	) No. C-96-1775 JSB)) Order Granting Defendants') Motion for Judgment on) the Pleadings))))))

Plaintiff, Diana Fairechild (Fairechild) filed this diversity action against United Airlines (United) on February 27, 1996 claiming a violation of California Labor Code section 3602(b)(2)(aggravation of work-related injury by employer's fraudulent concealment) and intentional infliction of emotional distress. Fairechild workde as a flight attendant for Pan American World Airways,Inc. (Pan Am) from 1966 until January 1986 based in Honolulu, Hawaii. In January 1986, when United bought Pan Am's routes, Fairechild began working for United in the same capacity as she had worked for Pan Am. She left that position in December 1987 as a result of a claimed disability, Multiple Chemical Sensitivity Syndrome (MCS), allegedly caused

by her exposure to a chemical called D-Phenothrin, an insecticide used inside aircrafts, while working for United. She alleges that this injury occurred from a direct exposure to the insecticide during an August 1986 flight from Honolulu to New Zealand and from a secondary exposure on a flight from Honolulu to San Francisco in December 1987.

In January 1989, Fairechild filed a workers' compensation claim against United in Honolulu. This claim was denied. Upon administrative appeal, Fairechild's claim was denied again based on lack of a medical or scientific basis to prove a diagnosis of MCS. Fairechild appealed that decision to the Hawaii Supreme Court. That appeal is pending.

THIS MOTION

United has filed two motions (1) a Rule 12 motion for judgment on the pleadings,[1] and (2) a motion to stay this action pending the outcome of the appeal currently before the Hawaii Supreme Court (due to the danger of inconsistent results).

On December 5, 1996, both parties appeared before this court for a hearing on the matter. United was represented by Phillip R. Diamond. Fairechild was represented by Thomas J. Kaster (Kaster). Both parties would stipulate to a stay of the proceedings pending the Hawaii

1 References to "Rule" are to the Federal Rules of Civil Procedure

appeal. However, United contends that its motion for judgment on the pleadings should be granted, thus obviating any need to stay these proceedings.

ANALYSIS

A. The parties' positions

1. Defendant/moving party United

United claims that its motion for judgment on the pleadings should be granted because the real issue in this diversity action is choice of law. The applicable law here is Hawaii law, which bars the present action. Under California's choice of law rule, a governmental interest approach is used to determine which state's law should be applied. Hawaii's law should be applied because only Hawaii has an interest in applying its law to this case. If Hawaii's workkers' compensation statute is applied, this action is barred by Hawaii's exclusive remedy provision.

2. Plaintiff Fairechild

Fairechild asserts that there is no true conflict of law or choice of law issue here. The forum state has an interest in applying its own law, and the law of the forum "will be displaced only if there is a compelling reason for doing so." Kasel v. Remington Arms Co., 24 Cal. App. 3d 711,731 (1972). There is no compelling reason to apply Hawaii law since California is the forum state and the injury occurred during

a United flight from Honolulu to San Francisco. California has an interest in applying its own law to deter employers doing business in the state from fraudulently concealing and aggravating work injuries which arose in part in California. A recent decision of the Hawaii Supreme Court, Hough v. Pacific Ins. Co., Ltd., 1996 WL 680234(Haw. Nov.26, 1996), greatly erodes Hawaii's exclusive remedy provision and therefore, even if Hawaii's law is to be applied, a stay of proceedings is appropriate.

B. GROUNDS FOR GRANTING JUDGMENT ON THE PLEADINGS.

A motion for judgment on the pleadings should be granted when the material facts are not in dispute and a judgment on the merits can be achieved by focusing on the content of the pleadings and any facts of which the court will take judicial notice.[2] 5A Charles A. Wright & Arthur R. Miller, Fed. Prac. & Procedure: Civil 2d § 1367 (2d ed. 1990). The complaint must be construed in the light most favorable to plaintiff, and all material allegations in the compllaint must be accepted as true. McGlinchy v. Shell Chemical Co., 845 F. 2d 802, 810 (9th Cir. 1988).

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2 United requests that the court judicially notice facts and law pursuant to Rule of Evidence 201, which mandates that the court take judicial notice if requested by a party and is supplied with the necessary information. United has pro-

United's motion for judgment on the pleadings should be granted because the outcome of the case is determined by whether California or Hawaii workers' compensation law applies. United is correct in contending that the court must look to California choice of law rules to determine which state's substantive law applies For the reasons stated below, Hawaii's substantive law applies, thereby barring this action.

1. California's Choice of Law Rule

A district court in a diversity case must apply the same choice of law analysis that a state court in the same jurisdiction would apply. Liew v. Official Receiver & Liquidator, 685 F.2d 1192 (9th Cir. 1981). California applies the

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2 continued
vided the court with the proper documentation and supporting evidence so that this court takes judicial notice of the following:

(1) On January 19, 1989, Fairechild filed a workers' compensation claim against United in Honolulu, Hawaii, alleging that she suffered "[s]econdary exposure to pesticides via carpets, seat fabrics, etc. and direct pesticide exposure in Australia and New Zealand while a flight attendant."
(2) Hawaii's Workers' Compensation Law, embodied in Hawaii Revised Statutes section 386-5 and 386-6, which provides in pertinent part, that workers' compensation is the exclusive remedy for a work injury.
(3) United is incorporated in the State of Delaware and has its principal place of business in Illinois.

"governmental interest' approach in a choice of law analysis, the objective of which is "to determine the law that most[3] appropriately applies to the issue involved." Offshore Rental Company, Inc., v. Continental Oil Co. 22 Cal 3d 157, 161 (1978). The "governmental interest" approach involves a three-step analysis in determining whether a choice of law question exists: (1) determination of whether the potentially concerned states have different laws, (2) consideration of whether each of the states has an interest in having its law applied to the case, and, if the laws are different and each has an interest in

3 Fairechild mistakenly claims that the law of the forum state may be displaced only if there is a compelling reason, relying on Kasel v. Remington Arms Co., 24 Cal.App. 3d 711,731 (1972). The "compelling reason" language in Kasel however, is no longer controlling law. The Second District expressly denounced the "compelling reason" language of Kasel in Cable Sahara Tahoe Corp., 93 Cal App. 3d 384 (1976), which made clear that the forum law is only a consideration in the "preliminary analysis" to identify whether a "true conflict" exists. Cable, 93 Cal. App.3d at 393-94 (citing Bernherd, 16 Cal. 3d at 320). See also Camp Forwarders Transport, Inc., 537 F.Supp. 636 638-39 (C. D. Cal. 1982) holding that such a preference would be inconsistent with California's governmental interest approach once a party timely invokes the law of a foreign state and shows application of that law will further an interest of the foreign state).

having its law applied, (3) which state's interests would be more impaired if its policy were subordinated to the policy of the other state. Sommer v.Gabor 40 Cal. App. 4th 1455,1467 (1995). See also Offshore Rental Co. Inc. 685 F.2d at 1196. Thecourt may make its own determination of the policies and interests of the states by reference to the decisional, and statutory law of the states involved. Liew, 685 F.2d at 1196-97.

a. CALIFORNIA AND HAWAII HAVE DIFFERENT LAWS.

Fairechild claims that no choice of law problem exists because both Hawaii and California have reasonably identical provisions governing workers' compensation. However, a comparison of Hawaii's and California's workers' compensation statutes shows that a significant difference exists which will determine whether or not Fairechild's claim will be dismissed. Hawaii's workers' compensation law, embodied in Hawaii Revised Statutes (HRS) section 386-5 provides:

Exclusiveness of right to compensation; exception. The rights and remedies herein granted to an employee or the employees dependents on account of a work injury suffered by the employee shall exclude all oth other liability of the employer to the employee, the employee's legal representative, spouse or anyone entitled to recover damages

from the employer, at common law or otherwise on account of the injury, except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy rela related thereto, in which case a civil action may be brought. HRS § 386-5 (1996).

HRS section 386-6 further provides:

Territorial applicability. The provision in this chapter shall be applicable to all all work injuries sustained by employees within within the territorial boundaries of the State.

If an employee who has been hired in the State suffers work injury, he shall be entitled to compensation under this chapter even though the injury was sustained without the State. The right to compensation shall exclude all other liability of the employer for damages as provided in section 386-5..HRS §386-6 (1996).

California Labor Code section 3602, while similarly providing compensation is the sole and exclusive remedy of the employee against the employer, contains an exception which in pertinent part, provides:

Exclusive remedy against employer; action for damages; conditions of employer's liability; security for payment of compensation...(b) An employee... may bring an action at law for damages against the employer as if this division did not apply, in the following instances:...

(2) Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. Cal.Lab. Code § 3602 (West 1996) emphasis added).

The laws of Hawaii and California addressing the "exclusive remedy" for a work injury contain a significant difference. Hawaii's law provides that workers' compensation is the exclusive remedy against an employer for a 'work injury". California, however, has a statutory exception to the "exclusive remedy" provision for claims arising from an employer's alleged fraudulent concealment of a work-related injury. This action attempts to take advantage of California's "fraudulent concealment" exception to the exclusive remedy.

b. HAWAII HAS A STRONGER INTEREST IN APPLYING ITS LAW.

Since a significant difference exists between Hawaii's and California's workers' compensation statutes, the court must consider whether each state has an interest in having its law applied to the case and, if each state has has an interest,which state's interest would be more impaired if its law were not applied. In order to determine whether each state has an inte an interest in applying its exclusive remedy provision in this case, the court must look at the purpose behind each state's law. Defendant cites Paulo v.Bepex Corp., 792 F.2d 894 (9th Cir. 1986), in asserting that the

Ninth Circuit has already addressed this situation.

The dispute in Paulo arose out of a work-injury sustained by the plaintiff in an industrial accident in Ontario, Canada, where plaintiff resided. Id. DefendantBepex, a California corporation that manufactured an allegedly defective meat grinder was incorporated in Delaware and had its principal place of business in Illinois but did business in California and Ontario. Id. The Ninth Circuit, affirming the district court,held that the district court properly applied Onatrio's workers' compensation law instead of California's products liability law. Id. at 896 . In its analysis, the court determined that a conflict of laws existed and that its resolution required examination of the policies underlying the relevant law of California and Ontario, respectively. Id. The policy underlying Ontario's workers' compensation law is to provide employees benefits regardless of fault but, at the same time, to protect from tort liability all employers who contribute to its compensation pool. Id. The policies underlying California's products liability law are, first, to compensate individuals injured by defective

products and, second--in contrast to Ontario's workers' compensation law--to deter the manufacture of such products. Id. Although the court found that California had some interest in deterring the manufacture of defective products which might injure California citizens and that interest might be undermined if Ontario law were applied, the court held that California has "little interest in applying its law to compensate citizens of Ontario." Id. at 896 (emphasis added). The court concluded that the California law was significantly different from Ontario law and that Ontario's interests would be more impaired than California's interests if Ontario laws were not applied. Id At 896.

The present case is, in relevant respects, similar to Paulo. California has created an exception to its exclusive remedy provision for an employer's fraudulent concealment of a work-related injury. California however, haslittle or no interest in applying its law to protect Fairechild in this case. Fairechild is a Hawaiian resident andemployee. Thus, there is no California employee whose interests would be protected byapplication of California's workers' compensation statute.

Fairechild argues that California has an interest in applying its law to deter employers doing business in California from fraudulent concealment. United is neither incorporated in California nor has its principal place of business in California. Although United does business in California, Paulo demonstrates that this is not an overriding interest revelent to deciding choice of law. See Paulo, 792 F.2d at 895. The Paulo court found that, while California had an interest in deterring the manufacture in California of defective goods which might injure its citizens, the purpose of Ontario's law in barring the action "would be significantly undermined if this Ontario employee were permitted to pursue tort litigation against an Ontario employer". Id. at 895-96. Similarly here, examination of the purpose behind Hawaii and California workers' compensation statutes reveals that Hawaii clearly has a stronger interest in applying its law. The purpose of Hawaii's exclusive remedy provision in its workers' compensation statute is "to achieve certainty--certainty that an employee will be compensated for all work injuries regardless of his negligence or fault, and certainty with regard to the amount for which the employer shall be liable." Hanagami v. China Airlines,

Ltd., 688 P.2d 1139, 1144 (1984). To allow Fairechild to apply California law because she has now alleged fraudulent concealment great greatly impairs the purpose behind Hawaii's law in achieving final resolution of a claim.

B. HAWAII'S EXCLUSIVE REMEDY PROVISION BARS THIS ACTION

1. There is no "Fraudulent Concealment" Exception Under Hawaii Law.

Since Hawaii law applies to the present case under California's choice of law analysis Hawaii's exclusive remedy provision bars the instant action as the Hawaii statute contains no exception for alleged fraudulent concealment. At oral argument, Fairechild claimed that a recent decision handed down by the Hawaii Supreme Court, Hough v. Pacific Insurance Co. Ltd., 1996 WL 680234 (Haw. Nov. 26, 1996), greatly eroded Hawaii's exclusive remedy provision. The Hough case, however, is readily distinguishable. The plaintiff in Hough alleged a separate claim against the insurance company based on allegations that the insurer committed intentional torts and acted in bad faith in processing the worker's compensation claim, causing separate and additional injury to the worker. In contrast, the claim that Fairechild alleges is against her employer, whom she has already sued in Hawaii for the

same work injury which underlies the instant claim.

Furthermore, where a plaintiff in Hawaii sought to assert a claim for defendants' fraudulent concealment of her work injury on the theory that Hawaii should recognize an exception to its exclusive remedy statute much like California's statutory exception to its exclusive remedy provision, the court found that [t]here is...no such exception under Hawaiilaw." Wrangler v. Hawaiian Electric Co. Inc., 742 F. Supp. 1465, 1468 (D.Haw. 1990). The court found that the basis of plaintiff's claim was sexual harassment and discrimination only; any attempt to add a claim for fraudulent concealment would fail as a matter of law in light of the exclusivity provision of Hawaii's workers' compensation statute. Id. Similarly, the basis of Fairechild's claim is her work injury only, like the plaintiff in Wangler, Fairechild's fraudulent concealment claim is also barred under Hawaii's exclusive remedy provision.

2. Emotional Distress Claims Are Also Barred Under Hawaii Law

Fairechild's claim for emotional distress damages are similarly barred by the exclusive remedy provision of Hawaii's Workers' Compensation law. Emotional distress claims arising out of a work injury are barred by the workers'

compensation statute. Wangler 742 F.Supp. at 1467 (alleged intentional and negligent infliction of emotional distress arose out of alleged sexual harassment discrimination). The Wanglercourt held that

> this broad policy accomplishes the beneficial purposes of workers' compsation law. The employer is held strictly liable for misconduct in the work place and the employee has an efficient economical remedy.

Id. (citing Lui v. Inter-Continental Hotels Corp., 634 F.Supp. 684 (D. Haw.1986)).See also Courtney v. Canyon Television & Appliance Rental, Inc., 899 F. 2d 845 (9th Cir 1990) (claim for emotional distress arose out of discharge and was barred by Hawaii workers' compensation law); Howard v. Daiichiya-Love's Bakery, Inc., 714 F. Supp. 1108 (D.Haw. 1989) (holding that plaintiff's alleged emotional distress injury arising out of an age discrimination claim fit within the definition of a work-related injury and was barred by the exclusivity provision of Hawaii's workers' compensation statute).

C. CONCLUSION

This action's connection to California is tenuous at best, as the only connection alleged is that the injury occurred on a flight from Honolulu to San Francisco. Hawaii, however, is

Fairechild's residence and her place of employment. In sum, United is correct in claiming that California's choice of law analysis applies here and that, under that analysis, Hawaii's workers' compensation statute is the applicable law. Plaintiff's claim is barred under Hawaii's Workers' Compensation statute, which recognizes no exception for an employer's fraudulent concealment.

IT IS HEREBY ORDERED THAT:

1. Defendants' motion for judgment on the pleadings is granted.
2. Defendants' motion to stay the proceedings is denied as moot.

Dated: December 17, 1996

Signed:

JOAN S. BRENNAN
United States Magistrate
Judge

RECEIVED Nov. 15,96

November 4, 1996

The Honorable Ronald T.Y. Moon
Chief Justice
Supreme Court of Hawaii
417 South King Street
Honolulu, Hi. 96813

Re: Fairechild v. United Airlines, et al.
Hawaii Supreme Court
No. 18726, and
related California
action, Fairechild v.
United Airlines,
USDC No. C-96-1775 JSB

Dear Justice Moon:

I have been assigned the case of fairechild v. United Airlines, C-96-1775 JSB. which is venued in U.S. District Court for the Northern District of California. Counsel have informed me and the pleadings have stated that there is a related case pending before the Hawaii Supreme Court. No 18726.

Both actions stem from the claim of a former United Airlines flight attendant that was injured in the course of her employment as a result of exposure to insecticide in the aircraft during a process referred to as "dis insection" which is required by the governments of certain Pacific Rim countries (including Australia and New Zealand) upon the landing of commercial aircraft in those countries.

The Hawaii case is an appeal from a decision of the Labor and Industrial Relations Appeals Board (Board) denying Ms Fairechild's claim for workers' compensation benefits. The principal issues on appeal appear to be: 1) whether or not the Board erred in denying claimant's motion for reconsideration and to reopen the record, and 2) whether or not the Board erred in concluding that Ms. Fairechild did not sustain a compensable work injury.

Although the laws of both states generally provide that workers' compensation is the exclusive remedy for work-related injuries, California law provides an exception and permits a direct action against the employer where the work-related injury is claimed to have been aggravated by an employer's fraudulent concealment of the injury and its connection to the employment, in which case the employer may be liable for damages caused by the aggravation. California Labor Code Section 3602(b)(2). The action I have been assigned is based on this statute.

Defense counsel in the California has filed a motion to stay the proceedings in California pending the outcome of the Hawaii

Supreme Court appeal, contending that common issues of fact (such as whether Ms. Fairechild has sustained a work-related injury) which have been determined in the Hawaii action and are on appeal may have res judicata or collateral estoppel effect in the California action. The hearing on the motion is scheduled to take place on December 5, 1996.

Thus, the Hawaii case may be dispositive of, or have some bearing upon issues in the California action, and an expedited decision in the Hawaii appeal, to the extent this is possible, would promote judicial economy.

Thank you for your consideration.

Very truly yours,

Signed:JOAN S. BRENNAN
U.S.Magistrate

cc: Thomas J. Kaster, Esq.
Philip R. Diamond, Esq.

Seal: SUPREME COURT-THE JUDICIARY- STATE OF HAWAII
417 South King Street-Ali'Iolani Hale,
Honolulu, Hawaii 96813-2912
Telephone (808) 539-4700 Fax 539-4703

RONALD T.Y.MOON
Chief Justice

Original FILED
Dec. 03, 1996
Richard W. Wieking
Clerk U.S. Dist. Court
Northern District of Calif.

November 26, 1996

Honorable Joan S. Brennan
United States Magistrate Judge
450 Golden Gate Avenue
San Francisco, CA 94102

Re: Your case: Fairechild v. United Airlines,Inc., et al (C-96-1775JSB)
Our Case: Fairechild v. United Airlines, Inc., et al (No. 18726)

Dear Judge Brennan:

I write in response to your November 4, 1996 letter regarding the above cited cases.

At this time, I cannot predict when our appeal will be completed. The appeal has been assigned for writing and, barring major disagreements regarding the rationale and the result, we will try to complete it within the next couple of months.

I wish I could be more definite. I have asked my staff to monitor this case, and I will write to let you know when it is completed.

Sincerely,

Signed: RONALD T.Y. MOON
Chief Justice

RTYM;snd

UNITED STATES DISTRICT COURT
Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

ORIGINAL FILED
Dec 03 1996
Richard W. Wieking
Clerk, US District Court
Northern Dist. of California

December 3, 1996

Chief Justice Ronald T.Y. Moon
State of Hawai'i Supreme Court
417 South King Street
Ali'iolani Hale
Honolulu, Hawai'i 96813-2912

Re: Your case
Fairechild v. United Airlines, Inc., et al., No. 18726
(Our case
Fairechild v. United Airlines, Inc., et al., No.C-96-1775 JSB)

Dear Justice Moon:

Thank you for your letter responding to my inquiry about the case referenced above. I appreciate your keeping me informed.

Sincerely,

Signed: JOAN S. BRENNAN
United States Magistrate Judge

cc: Thomas J. Kaster
Philip R. Diamond

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

DIANA FAIRECHILD Claimant-Appellant vs. UNITED AIRLINES, INC., and PACIFIC INSURANCE COMPANY, LTD., Employer/Insurance Carrier-Appellee	CASE NO.AB 90-182 (2-89-02035)

DECISION AND ORDER

This workers' compensation case is before the Board on appeal by Claimant, DIANA FAIRECHILD, from the decision of the Director of Labor and Industrial Relations dated Feb. 23, 1990, denying her claim for compensation.

The sole issue on appeal is whether Claimant sustained an injury on December 20, 1987, arising out of and in the course of her employment.

The Board served each party with a Proposed Decision and Order on October 3, 1994. To meet the requirements of Hawaii Revised Statutes (HRS) §91-11, the parties were afforded an opportunity to file exceptions and present written arguments to the Proposed Decision and Order. On October 18, 1994, Claimant filed her exceptions and argument with accompanying exhibits, some of which were not previously made a part of the

administrative record, which was closed on September 25, 1991. Employer filed its exceptions and argument on October 19, 1994. On October 20,1994, Employer filed an objection and request to strike those portions of Claimant's exceptions that make reference to newly submitted information that were not part of the record.

Under Hawaii Laborers' Training Center v. Agsalud, 65 Haw. 257, 650 P.2d 574 (1982), the Hawaii Supreme Court stated that HRS §91-11 allows a party to have "an opportunity to present argument in written or oral form in support of its exceptions [to a proposed agency decision] and to have those exceptions considered on their merits based on the record ." (emphasis ours). On that basis, we grant Employer's request to strike and will not consider the exhibits as well as any references to new information contained in Claimant's exceptions not previously made part of the administrative record.

Having reviewed the parties, exceptions and arguments we issue the following final Decision and Order, affirming the Director's decision.

FINDINGS OF FACT

!. Claimant, DIANA FAIRECHILD, was a flight attendant employed by Pan American

World Airways (Pan AM) for about twenty years.

2. In accordance with government policy, aircrafts arriving in New Zealand or Australia from foreign soil were routinely sprayed with an insecticide called D-Phenothrin before the passengers and flight crew were allowed to deplane.

3. Claimant flew the New Zealand and Australian routes during her twenty-year employment with Pan Am. She was exposed to insecticide each time she flew on those routes.

4. In January of 1985, on a flight from Honolulu to New Zealand, Claimant's eyes became irritated after her plane was sprayed with insecticide. She also experienced headaches, feelings of disorientation, and a burning sensation in the nose, sinuses, and throat.

5. Upon her return to Honolulu, Claimant was evaluated by allergy specialist, Dr. Arthur Neilson, on January 21, 1985. Upon examination, Dr. Neilson found no stigmata of allergic disease. He opined that Claimant's reaction to the insecticide spray was not an allergic reaction, but an irritative response of the mucus membranes of the respiratory tract and the conjunctivae.

6. On February 11, 1985, Claimant sought further evaluation with Dr. George Ewing, another allergy specialist. According to Dr.

Ewing's consultative report, Claimant experienced eye itch and secretion, fatigue, lung distress, and muscle spasms after exposure to insecticide at work. Dr. Ewing noted that Claimant had a positive history for fibrocystic disease of the breast and pulmonary embolus in 1968 with resulting residual lung scars. The report also documented Claimant's professed sensitivity to tobacco smoke, newsprint, caffine, sugar, deodorants, most soaps, and perfume.

7. On February 14, 1995, using a sample of D-Phenothrin supplied by Claimant, Dr. Ewing performed provocation-neutralization test. The test involved the administration of diluted samples of D-Phenothrin to Claimant to test her reaction upon exposure to the chemical. Dr. Ewing testified that he placed three droplets of diluted D-Phenothrin under Claimant's tongue. Shortly thereafter, Claimant reacted with subjective symptoms that included shooting pains, rapid heart beat, anxiety, burning in the tongue, headaches, and pressure in the chest.

The provocation-neutralization test is sanctioned by the Academy of Otolaryngic Allergy, but not by the Academy of Allergy and Immunology. The test is also not used

or approved by conventional allergists in the medical community.

According to Dr. Ewing, the provovaation-neutralization test and Claimant's oral history confirmed her sensitivity to D-Phenothrin. On that basis, he diagnosed her with chemical sensitivity to D-Phenothrin.

8. Claimant did not lose time from work as a result of the 1985 chemical reaction. Her symptoms cleared up within a few days of the exposure.

9. On May 17, 1985, Dr. Ewing cautioned Claimant that she could ultimately develop sensitivities to other chemical aerosols if her exposure to insecticide continues.

10. After the 1985 exposure. Claimant avoided further exposures to D-Phenotrin during the remainder of her employment with Pan Am.

11. In February of 1986, Claimant became an employee of Employer, UNITED AIRLINES, INC., after it purchased Pan Am's flight routes.

12. On August 12, 1986, while on a New Zealand route, Claimant was again exposed to D-Phenothrin. During her layover in New Zealand, Claimant's eyes became irritated. She described them as looking like "golf balls", with a pus-like discharge. She slso described dark circles under the eyes, and scaley skin around the eyes.

13. Prior to August 12, 1986, Claimant had not been exposed to D-Phenothrin since January of 1985.

14 Claimant sought treatment with Dr. Simon Barclay at Auckland Medical Services on August 14, 1986. He prescribed antibotic eye drops and a cream, but made no diagnosis.

15. Claimant followed up with Dr. Wayne Wilson on August 15, 1986, upon her return to Honolulu. Dr. Wilson diagnosed blepharitis or inflamation of the eye-lids. He prescribed Maxidex solution and Naphcon A for her eyes.

16. Employer did not dispute liability for Claimant's eye problems from the August 1986 exposure, and paid all medical expenses relating thereto. Claimant's eye symptoms resolved by August 24, 1986.

17. Claimant experienced recurrent eye symptoms in September of 1986, after flights to Tokyo and New York. She attributed her symptoms to cigarette smoke on the plane, the smells of jet fuel, and residues of insecticide in the carpeting and upholstery of the planes she worked on. Although aircrafts arriving in Tokyo and New York were not sprayed with insecticide, Claimant asserted that the planes she was on had previously been sprayed and that her symptoms were precipitated by residues of insecticide that accumulated in the planes' carpeting and upholstery.

18. Claimant saw Dr. Geoffrey Davis, an ophthalmologist, on September 12, 1986. She complained of swelling of her lower lids with itching and redness in both eyes as a result of exposure to spray insecticides. Upon examination, Dr.Davis found minimal swelling of both lower lids, slight conjunctival infection with mild papillary reaction. His impression was mild stopic conjunctivitis of unclear etiology. Dr. Davis recommended treatment with steroid cream, but Claimant declined.

19. On November 26, 1986, Claimant began treatment with Dr. Gregory Yuen, a psychiatrist. According to Dr. Yuen's records, Claimant had difficulty making the transition to a new employer. She was upset with the possibility of losing her senority from Pan Am and criticized her union for not adequately addressing her concerns. She disliked Employer's "polyester" uniform, and complained about the poor air circulation in Employer's DC-10 planes, which, in her opinion, was made worse by Employer's liberal smoking policy. She also had trouble learning new work procedures and services, and getting along with her new co-workers. Besides job adjustment, Claimant also had problems with personal and familial relationships, life purpose, and depression. Dr. Yuen's impression was adjustment disorder with mixed emotional features.

20. According to his chart notes between December of 1986 and December of 1987, Dr. Yuen saw saw Claimant on a monthly basis, sometimes as many as six times per month, for a variety of problems relating to relationships with men, family members, and friends, overeating, problems with co-workers and supervisors, and stress from demanding passengers.

21. In May of 1987, Claimant received a poor job evaluation. The evaluation report stated that Claimant violated FAA rules by leaving leaving her seat during the plane's taxi, gave incorrect time information to passengers, and failed to perform first-class service in accordance with airline procedures.

22. In response to the report,Claimant's supervisor suggested that she see a therapist for her adjustmentproblems. No further action was taken by Employer.

23. On December 20, 1987, on a flight to San Francisco from Honolulu, Claimant flew on a plane that had just made stops in New Zealand and and Australia prior to landing in Honolulu. Claimant alleged exposure to D-Phenothrin on this date.

24. On December 22, 1987, Claimant saw Employer's physician, Dr. Elmer Johnson, for a cough of six days duration. There were no complaints of eye irritation. Dr. Johnson

diagnosed an upper respiratory infection.

25. Claimant was rechecked by Dr. Johnson on December 26, 1987. Dr. Johnson noted that Claimant was still coughing with moderate mucus production, and agains attributed her coughing to an upper respiratory infection. He prescribed medication and urged Claimant to see her personal physician for a release to return to work.

26. Claimant did not return to work after December 20, 1987. She continued to see Dr. Yuen for psychiatric treatment throughout 1988.

27. Claimant returned to Dr. Ewing on August 11, 1988,for re-evaluation. In response to an allergy questionaire from Dr. Ewing, Claimant indicated that in the past eight months, developed intolerance for or sensi tivity to all antibiotics, , penicillin, mycins, house dust, newsprint, tobacco smoke, perfumes, powders, insecticides, jet fuel, hair sprays, carpet, dairy products, and synthetic fabrics.

Examination on this date revealed clear skin, normal eardrums and canals, mild congestion, normal teeth and gums, mild conjunctival condition in the eyes, normal heart sounds, and clear lungs. Dr Ewing noted that Claimant was obviously stressed, anxious, and

concerned about her health.

Based on Claimant's history and her responses in the allergy questionaire, Dr. Ewing diagnosed her with multiple chemical sensi_ tivity (MCS) with chronic anxiety and depression. He recommended that Claimant avoid chemicals that could aggravate her symptoms and that she seek work in a less polluted enviornment. He saw no need for further work-up or laboratory testing.

28. Although Dr. Ewing was aware that Claimant was under psychiatric care when he saw her in 1988, he rendered his diagnosis without first inquiring into the nature and extent of her psychiatric condition and without further diagnostic work-up.

29 After Dr. Ewing diagnosed Claimant with MCS, Dr. Yuen changed his diagnosis of adjustment disorder to organic mood syndrome. Dr. Yuen testified that he now considers Claimant's emotional difficulties or mood to be a product of an organic, physical cause. Dr. Yuen conceded that the change was prompted by Dr. Ewing's diagnosis of MCS.

30. On January 24, 1989, Claimant filed a workers' compensation claim againstEmployer, alleging that she acquired the condition of MCS as a result of her exposure to D-Phenothrin

at work. Claimant claimed that her re-exposure to D-Phenothrin on December 20, 1987, upset her tolerance for the chemical, causing her to develop reactions to other non-related chemicals in the enviornment. Claimant identified December 20, 1987, the date of her last expo sure , as the date of her injury, and December 22, 1987, as the date she became totally disabled from work.

31. Claimant denies and did not make a claim for psychiatric injury.

32. Claimant testified that between August of 1986 and December of 1987, she had recurrent eye symptoms, anxiety, difficulty breathing, and motor coordination problems that have rendered her accident-prone and absent-minded. She attributed these symptoms to MCS.

33 Client currently lives in a rural area in upcountry Maui. In order to minimize chemical exposures, Claimant leads a reclusive existence, avoiding traffic and most people.

34. According to Dr. Ewing, the development of MCS follows a typical course that usually begins with a major exposure to one or more chemicals. The exposure may occur briefly at high levels or repeatedly or continuously at a lower level. Upon exposure or exposures to the chemical, victims develop or experience symptoms including but not limited to dizziness, headaches, aches and

pains, and disorientation. Overtime, they become sensitized to other related or non-related chemicals in the environment at doses far below those established to be harmful to the general population.

35. Dr Ewing admitted that there is no immunologic test to define MCS and that sufferers of MCS do not respond to conventional allergy skin testing. His diagnosis of MCS was based primarily on Claimant's accounts of cause and effect relationships between her exposure to chemicals and her resultant reactions and symptoms following the exposure. He opined that Claimant did not have MCS when he first treated her in 1985.

36. According to Dr. Ewing, the diagnosis of MCS is usually made after other illnesses or possible causes have first been eliminated or excluded.

37. Dr. John McDonnell, board certified in allergy and immunology, opined that thereis no objective scientific or medical basis to support Dr. Ewing's diagnosis of MCS, a condition also known as enviornmental illness. There was no scientific evidence to show that Claimant's initial reaction to one chemical led her to become sensitive to a host of other unrelated chemicals in the enviornment. Except

for her eye irritations, which doctors have diagnosed as blepharitis and conjunctivitis, Claimant's other symptoms were vague and subjective and unsubstantiated by objective findings. Unlike allergy sufferers, whose symptoms can be objectively and clinically verified by testing with reproducible results, thosediagnosed with MCS do not respond to conventional objective testing.

Dr. McDonnell was also critical of Dr. Ewing's diagnostic methods in this case, because Dr. Ewing accepted at face value Claimant's cause and effect associations and rendered a diagnosis based on that without further inquiry into other possible explainations for her health problems.

As for the provocation-neutralization testing, Dr. McDonnell opined that the test was conducted with flawed methodology, and, therefore, invalid.

According to Dr. McDonnell, numerous double blind controlled studies have been conducted to test the claims of those who advocate the theory of enviornmental illness or MCS as an organic illness. Thus far, no scientific study published in conventional scientific peer-reviewed medical literature has been able to prove that enviornmental illness or MCS actually exists. In Dr. McDonnell's opinion, MCS is a philosophy or belief that

has gained anecdotal notoriety in lay and non-peer-reviewed medical literature, but remains unsubstantiated by scientifically sound research.

Dr. McDonnell conceded that Claimant may have initially developed irritative reaction from insecticide at work resulting in blepharitis or conjunctivitis in 1985 and 1986. He opined, however, that Claimant did not suffer any organic injuryfrom exposure to insecticide beyond that of an eye irritation. We credit Dr. McDonnell's opinions.

38. Dr. Eric Comstock, a medical toxicologist, opined that the existence of environmental illness or MCS has not been scientifically proven. Dr. Comstock acknowledged that Claimant may have suffered an eye irritation in the form of blepharitis or conjunctivitis following her exposure to insecticide spray. He opined, however, that Claimant does not currently suffer from any organic illness as a result of her chemical exposure at work. Dr. Comstock diagnosed Claimant's current condition as an iatrogenic chemophobic anxiety reaction to chemicals. The condition causes her to experience heart palpitations, sweating, and feelings of avoidance whenever she is exposed to chemicals. He opined that Claimant's current and ongoing morbidity is perpetuated by the practice of chemical avoidance advo-

cated by her physician. We credit Dr. Comstock's opinions.

39. The diagnostic methods and treatment of MCS, which Dr. Ewing subscribes to and used in this case, have not been proven reliable, effective, or scientifically valid. For that reason, neither the American Academy of Allergy and Immunology nor conventional allergists in the medical community recognizes the concept of MCS.

CONCLUSIONS OF LAW

We conclude that Claimant did not sustain an injury on December 20, 1987, arising out of and in the course of employment.

Claimant contends that she should prevail on her claim given the divergent medical evidense on MCS and the force of the presumption of compensability under HRS §386-85. We disagree.

We have previously stated that, in a case where compensability is at issue, a claimant may not avail himself to the statutory presumption that an injury arose from employment, unless the injury or evidence of such has first been established. Gary P. Adric v. Kiewit Pacific Company, AB 90-92(K) (June 2, 1992); see also, 2C Larson, The Law on Workers' Compensation, §80.33(a) (1993) (statutory presumption does not apply until claimant first establishes the facts required to invoke the

presumption). Therefore, before we can even apply the presumption to determine causation in this case, we must first determine whether Claimant has an injury.

In appropriate circumstances, an injury can be established by lay testimony without medical evidence. 2B Larson, The Law on Workers' Compensation §79.51(b) (1993). "For example, if an employee falls at work and cuts his arm, then medical evidence is not normally necessary to prove thatthe employee has sustained an injury." Cardyn v. Workmen's Comp.App. Bd. 534 A.2d 1390 (Pa. 1987). However, in some cases, it is impossible to discuss causation of an injury without first analyzing in medical terms what the injury or disease is. 2B Larson, supra, at §79.51(a). According to Professor Larson, the general rule is "if the physical causal sequelae between accident and injury is sufficiently impressive, then the lack of a precise diagnosis or etiology can usually be excused". 2B Larson, supra, at §79.51(d). However, "as the degree of complexity of the medical issues increases, so does the degree of thoroughness and definitemess of diagnosis". 2B Larson, supra , at §79.54(i). In these situations, a diagnosis, based upon reliable and proven medical and scientific criteria, is, in our view, necessary to establish the injury for which the employee claims compensation.

In this case, Claimant alleges a condition that took more than twenty years to evolve, but did not fully develop until December of 1987. The nature of Claimant's alleged injury describes neither a systemic disease nor an acute illness evidenced by a demonstrable organic pathology. Instead Claimant alleges an allergic condition to a variety of common everyday chemicals and substances that is manifested by an assortment of recurring subjective complaints which she claims to have resulted from exposures to a single chemical at work. We find that the complexity of the medical problem alleged in this case requires that the claimed injury be established by a diagnosis based upon reliable and proven scientific or medical criteria.

On the record before us, we conclude that the claimed injury has not been established due to the lack of reliable orproven medical or scientific basis to support or confirm the diagnosis of MCS. The record shows that Dr. Ewing based his diagnosis primarily on the oral history presented by Claimant and his whole-hearted acceptance of the given history as fact. There were no objective findings to substantiate Claimant's subjective symptoms. Although Dr. Ewing maintained that MCS is a diagnosis made by exclusion of other illnesses or affections, he himself made no efforts to

to rule out other possible causes for Claimant's complaints. Hence, there was no clear evidence that Claimant's symptoms were, in fact related to allergy, sensitivity, toxicity, or any other type of reaction from chemicals.

Although Dr. Ewing performed a provocation-neutralization test in 1985, the test, setting aside for the moment Dr. McDonnell's charges of invalidity, proved at best that Claimant was allergic or sensitive to D-Phenothrin. It did not establish MCS. Even Dr. Ewing agreed that Claimant did not have MCS in 1985.

In any case, the diagnostic methods used by Dr. Ewing in this case has not been proven to be reliable, effective, or scientifically valid. Therefore, for this and all of the above reasons, we are unable to accept his diagnosis of MCS.

Accordingly, having concluded that Claimant has failed to establish the injury for which she claims compensation, we are unable to to conclude that Claimant sustained an injury on December 20, 1987, as a result of exposure to D-Phenothrin at work. At most, Claimant has proven that she suffered anirritative reaction to D-Phenothrin, in the form of blepharitis and conjunctivitis, when she was exposed in 1985 and 1986. There was no evidence that she

suffered a similar reaction on December 20, 1987.

The record does show that Claimant suffered from an upper respiratory infection with coughing and minimal mucus production on December 20, 1987. However, according to Dr. Johnson's records, the condition began four days prior to that date. That being the case, neither Claimant's respiratory infection nor her her coughing symptoms could have been related to her work on December 20, 1987.

ORDER

The decision of the Director dated February 23, 1990, is hereby affirmed, in accordance with the foregoing findings of fact, conclusions of law, and chapter 386 of the Hawaii Revised Statutes

Dated: Honolulu, Hawaii, Nov.2,1994

Signed: FRANK YAP, JR,Chairman

CAROL K. YAMAMOTO, Member

CHARLES T. AKAMA, Member

Appendix "F"

CONSTITUTIONAL PROVISIONS
STATUTES AND RULES INVOLVED

AMENDMENT XIII: Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party has been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

AMENDMENT XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

HAWAII REVISED STATUTES

HRS Section 386-5 Exclusiveness of right to compensation; exception. The rights and remedies herein granted to the employee or the employee's dependents on account of a work injury suffered by the employee shall exclude all other liability of the employer to the employee, the employee's legal representative, spouse, dependents, next of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of injury, except for sexual harassment of sexual assault and infliction of emotional distress or invasion or privacy related thereto, in which case a civil action may also be brought. (Underlined portion was added by the Laws of 1992, Act 275.)

HRS Section 386-6: Territorial applicability. The provision of this chapter shall be applicable to all work

injuries sustained by employee within the territorial boundaries of the State.

If an employee who has been hired in the State suffers work injury, he shall be entitled to compensation under this chapter even though the injury was sustained without the State. The right of compensation shall exclude all other liability of the employer for damages as provided in Section 386-5. All contracts of hire of employees made within the State shall be deemed to include an agreement to that effect...

CALIFORNIA LABOR CODE

Section 3602. Exclusive remedy against employer; action for damages; condition of employer's liability

(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee and his or her dependents against the employer, and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer.

(b) An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, in the following instances:

(1) Where the employee's injury or death is proximately caused by a willful physical assault by the employer.

(2) Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer.

RULE 35. OPINIONS

(a) Classes of Opinions. Opinions may be rendered by a designated judge or justice, or may take the form of per curiam or memorandum opinions.

(b) Publication. Memorandum opinions shall not be published.

(c) Citation. A memorandum opinion shall not be cited in any other action or proceeding except when the opinion establishes the law of the pending case res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.

(d) Mailing by Clerk. The clerk shall promptly mail all parties a copy of the opinion.

NO. 18726

IN THE SUPREME COURT OF THE STATE OF HAWAII

DIANA FAIRECHILD, Claimant-Appellant vs. UNITED AIRLINES, INC., Employer-Appellee, Self-Insured and PACIFIC INSURANCE COMPANY Insurance Adjuster Appellee	CASE NO. AB. 90-182 (2-89-02035) SUPPORTING AFFIDAVIT

SUPPORTING AFFIDAVIT

STATE OF HAWAII)
) SS
CITY AND COUNTY OF HONOLULU)

JOSEPH A. RYAN, being duly sworn deposes and says:

1. He is an attorney for Claimant-Appellant and he makes this affidavit in support of her Motion for Reconsideration.

2. Attached hereto for the convenience of the Court in considering this motion, and marked Exhibit "A" is a true and correct copy of the Order Granting Defendants' Motion for

Judgment on the Pleadings, executed by Joan S. Brennan, UnitedStates Magistrate Judge, United States District Court, Northern District of California, on December 17, 1996, and filed with the Clerk of said Court on December 23, 1996, in No. C-96-1775 JSB, Diana Fairechild, Plaintiff, vs. United Airlines, Inc., et al,Defendant.

3. Attached hereto is a true and correct copy of a communication from the Office of Hon. Patsy T. Mink, a Member of the House of Representatives from Hawaii to which is a true and correct copy of a communication from the Department of Health and Human Services concerning the national interest in the problems caused by Multiple Chemical Sensitivity (MCS) and said matter is marked as "Exhibit "B".

4. Affiant verily believes that it was an incident of slavery and involuntary servitude for a master to intentionally whip, or otherwise physically injure a slave or peon with impunity.

5. Affiant verily believes that the law of Hawaii and of the United States via the Thirteenth and Fourteenth Amendments prohibit an employer from intentionally poisoning an employee in the course of employment.

6. Affiant respectfully suggests to the Court that the Memorandum Opinion in this case denies the injured employee the Equal Protection of the Law as well as liberty and property rights without due Process of Law.

Further Affiant sayeth naught.

Signed:

JOSEPH A. RYAN

Subscribed and sworn to before me
this 27th day of January, 1997.

S/ Mike Kelly
Notary Public, State of Hawaii

My commission expires 8/19/97.

(3)

Supreme Court, U.S.
FILED
AUG 21 1997
CLERK

No. 97-178

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

DIANA FAIRECHILD,
Petitioner,

v.

UNITED AIRLINES, INC. AND
PACIFIC INSURANCE COMPANY, LTD.,
Respondents.

BRIEF IN OPPOSITION

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No. 97-178

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

DIANA FAIRECHILD,
Petitioner,

v.

UNITED AIRLINES, INC. AND
PACIFIC INSURANCE COMPANY, LTD.,
Respondents.

BRIEF IN OPPOSITION

I. QUESTIONS PRESENTED.

UNITED AIRLINES, INC., Respondent ("Employer") and PACIFIC INSURANCE COMPANY, LTD., Respondent ("Insurance Adjuster") (herein sometimes collectively referred to as "Respondents") assert there is no valid federal question presented for review by DIANA FAIRECHILD ("Petitioner").

II. OFFICIAL AND UNOFFICIAL REPORTS.

Copies of the official and unofficial reports are presented in the "Appendix" as follows:

Notice And Judgment On Appeal, Supreme Court of the State of Hawaii dated February 13, 1997.

Complaint For Damages, Superior Court of the State of California for the City and County of San Francisco dated February 27, 1996.

Order Denying Claimant-Appellant's Motion For Reconsideration And Reopening Of Decision Or [sic] Order, Labor and Industrial Relations Appeals Board dated January 19, 1995.

Decision And Order, Director of Labor and Industrial Relations dated February 23, 1990.

III. BASIS FOR JURISDICTION.

Petitioner seeks to invoke jurisdiction pursuant to 28 U.S.C. Section 1257(a), Rule 13.1, Revised Rules of the Supreme Court of the United States and Article III and Amendment XIII of the United States Constitution.

Respondents assert this Honorable Court has no jurisdiction to review the order of the Supreme Court of Hawaii because Petitioner did not affirmatively or properly present, on the face of the record, a federal question constituting an appropriate ground for review. The alleged federal questions were neither timely raised nor specifically

decided by the Labor and Industrial Relations Appeals Board ("Appeals Board") and the Hawaii Supreme Court.

IV. STATEMENT OF THE CASE.

On January 19, 1989, Petitioner filed a WC-5 Employee's Claim For Workers' Compensation Benefits alleging she was "environmentally allergic" due to direct and secondary pesticide exposure on aircraft. [R, p. 5]. A hearing was held at the Department of Labor and Industrial Relations, Disability Compensation Division on September 27, 1990 to determine the compensability of this claim. [R, p. 49]. By Decision And Order of the Director of Labor and Industrial Relations ("Director") dated February 23, 1990, Petitioner's claim for workers' compensation benefits was denied. [R, pp. 437-438; Appendix pp. 20A-25A].

Petitioner appealed the Director's Decision And Order of February 23, 1990 to the Appeals Board on March 7, 1990. [R, p. 451]. Hearings were held by the Appeals Board on July 18, 1991, September 16, 1991 and September 25, 1991 to determine the sole issue of whether Petitioner sustained an injury arising out of and in the course of her employment with Employer on or about December 20, 1987 compensable under Chapter 386, Hawaii Revised Statutes.

The Appeals Board issued a Proposed Decision And Order dated October 3, 1994. [R, pp. 1155-1170]. Petitioner filed her Exceptions And Arguments To Findings Of Fact And Conclusions Of Law on October 18, 1994. [R, pp. 1173-1231]. Respondents filed their Exceptions To Proposed Decision And Order on October 19, 1994. [R,

pp. 1232-1237]. The Appeals Board filed its Decision And Order on November 2, 1994, and determined the claimed injury was not established due to the lack of reliable or proven medical or scientific basis to support or confirm the diagnosis of multiple chemical sensitivity. The Appeals Board concluded Petitioner failed to establish an injury compensable under Hawaii law and affirmed the Director's Decision of February 23, 1990 denying the workers' compensation claim. [R, pp. 1252-1568; Appendix E to Petitioner's Writ Of Certiorari]. Petitioner filed a Motion For Reconsideration And Reopening Of Decision Or [sic] Order on December 1, 1994. [R, pp. 1275-1308]. On January 19, 1995, the Appeals Board filed its Order Denying Claimant-Appellant's Motion For Reconsideration And Reopening Of Decision Or (Sic) Order. [R, pp. 1329-1330; Appendix pp. 18A-19A]. Claimant filed a Notice Of Appeal And Designation Of Record On Appeal to the Hawaii Supreme Court on February 9, 1995. [R, pp. 1335-1339]. After briefs were submitted by the parties, the Hawaii Supreme Court filed its Memorandum Opinion on January 16, 1997 affirming the Appeals Board Decision And Order denying compensation to Petitioner. [Appendix A to Petitioner's Writ Of Certiorari]. Petitioner filed a Motion For Reconsideration to the Hawaii Supreme Court on January 27, 1997 which was denied by Order dated February 5, 1997. [Appendix B to Petitioner's Writ Of Certiorari]. Notice And Judgment On Appeal were entered on February 13, 1997 [Appendix pp. 2A-6A].

Petitioner filed a Complaint For Damages against Employer in the Superior Court of the State of California for the City and County of San Francisco on February 26, 1996. [Appendix pp. 7A-17A]. On May 13, 1996, the

case was removed by Employer to the United States District Court for the Northern District of California. Upon motion by Employer, the United States District Court filed its Order Granting Defendant's Motion For Judgment On The Pleadings on December 20, 1996, indicating the action's connection to California was tenuous at best and the applicable law was Hawaii's workers' compensation statute. The Court concluded Petitioner's claim was barred under the Hawaii workers' compensation statute which recognized no exception for an employer's fraudulent concealment. [Appendix C to Petitioner's Writ Of Certiorari].

Petitioner filed a Petition For Writ Of Certiorari To The Supreme Court Of The State of Hawaii on or about July 31, 1997. The sole issue determined by the Director, the Appeals Board and the Hawaii Supreme Court was whether Petitioner sustained a compensable work injury arising out of and in the course of her employment with Employer on December 20, 1987 pursuant to Chapter 386, Hawaii Revised Statutes. A federal question was neither presented by Petitioner nor passed upon by the State administrative agencies and the Hawaii Supreme Court.

V. SUMMARY OF THE ARGUMENT.

A. This Honorable Court Lacks Jurisdiction To Grant Petitioner's Petition For Writ Of Certiorari Under 28 U.S.C. Section 1257.

1. Petitioner did not expressly or timely raise any federal question in the State administrative agency proceedings, and the State administrative agency and the Hawaii Supreme Court neither entertained a federal question nor decided it.

2. Petitioner's assertion that Hawaii's workers' compensation law is violative of Article III and Amendment XIII of the United States Constitution is unfounded and frivolous; the validity of the workers' compensation law as an exclusive remedy for work-connected injuries is well-established.

VI. ARGUMENT.

A. This Honorable Court Lacks Jurisdiction To Grant Petitioner's Petition For Writ Of Certiorari Under 28 U.S.C. Section 1257.

1. A Federal Question Was Neither Timely And Expressly Raised By Petitioner Nor Was It Passed Upon By The Appeals Board And The Hawaii Supreme Court.

It has long been settled that this Court has no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by the state court. Mellon v. O'Neill, 275 U.S. 212, 214-215 (1927). The Court indicated "it is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a federal nature." Id. at 215.

The United States Supreme Court indicated in Cardinale v. Louisiana, 394 U.S. 437, 439 (1969), that it was very early established that the Court will not decide federal constitutional issues raised for the first time on

review of state court decisions. This principle was established with Owings v. Norwood's Lessee, 5 Cranch 344 (1809) and the Judiciary Act of 1789, c. 20, Section 25, 1 Stat. 85 vested the court with no jurisdiction unless a federal question was raised and decided in the state court below. 10 Pet. 368, 391. See Bankers Life & Casualty Company v. Crenshaw, 486 U.S. 71, 78-80 (1988); Webb v. Webb, 451 U.S. 493, 495 (1981); Mutual Life Insurance Company of New York v. McGrew, 188 U.S. 291, 308 (1903).

By her own admission, Petitioner acknowledged she failed to timely raise any federal question during the State agency proceedings. "Petitioner's initial attorney failed to recognize that she, as well as all employees in Hawaii, are subjected to cruel and unusual punishment (intentional physical injury) - "purposeless and needless imposition of pain and suffering" - by a State of Hawaii law which said law the State writes into every employment contract. Said attorney failed to raise the constitutional issues and subjected her to the "exclusive" Workers' Compensation Law of Hawaii. After substitution of attorneys, Petitioner raised the issues involved herein by filing her claim as preserved under the Labor Law of California." [Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii, e. Grounds Of Jurisdiction, p. 4 (emphasis added)]. Filing a separate civil action in California did not make timely or otherwise validate the alleged federal constitutional issues in the Hawaii workers' compensation case. This leap in reasoning is entirely misplaced.

Petitioner submitted her State workers' compensation claim for administrative determination on January 19, 1989, eight and a half years ago. Petitioner failed to raise any federal question at the time of the initial hearing before the Director. Petitioner then had the opportunity to present a

federal question not once, but three times to the Appeals Board and failed to do so. Appeal of the Appeals Board's Decision And Order is on the record and the Hawaii Supreme Court reviews the Appeals Board's decision on matters of law only. No new evidence may be introduced to the Hawaii Supreme Court unless clearly, newly discovered and material to a decision of the appeal. (Section 386-88, Hawaii Revised Statutes.)

Petitioner then allegedly raised the federal question for the first time in a supporting affidavit appended to her Motion For Reconsideration to the Hawaii Supreme Court. The Hawaii Supreme Court summarily denied the Motion For Reconsideration on February 5, 1997. The long established general rule is that an attempt to raise a federal question after judgment, upon a petition for rehearing, is too late unless the court actually entertains the question and decides it. Herndon v. Georgia, 295 U.S. 441, 443 (1935). The United States Supreme Court has held that a federal question first raised in a petition for rehearing in a highest state court is raised too late to confer jurisdiction where the petition was denied without rehearing. McGrew, 188 U.S. at 308.

In contrast, the United States Supreme Court has heard state workers' compensation cases regarding successive awards between states when the federal question of application of the Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution was raised at the the first state administrative proceedings on the claims. Jurisdictional problems never arose because the federal question was timely asserted and expressly passed upon by the state court. See Industrial Commission of Wisconsin v. McCartin, 330 U.S. 622 (1947); Thomas v. Washington Gas Light Co., et al., 448 U.S. 261 (1980). In the instant case, Petitioner had four opportunities to raise any federal

question at the hearings before the Director and the Appeals Board and failed to do so.

Critical to the Court's determination of whether or not to exercise jurisdiction over questions not properly raised below are the policy and practical considerations including comity to the states and the Court's need for a properly developed record on appeal. It is important that state courts be given the first opportunity to consider the applicability of state statutes in constitutional challenges since the statutes may be construed to preserve their constitutionality or the issue may be resolved by an adequate state ground. Raising the federal issue first in state court affords the parties the opportunity to develop the record necessary for adjudicating the issue. The record likely will be inadequate where federal questions are not raised below. Cardinale, 394 U.S. at 439; Crenshaw, 486 U.S. at 79; Webb, 451 U.S. at 500-501.

In the instant case, Petitioner did not raise any federal question at the multiple hearings before the Director and the Appeals Board to afford them a fair opportunity to consider or address the federal question that is sought to be presented here. Careful review of the record shows it is devoid of an assertion of any alleged federal question and that the Director, the Appeals Board and the Hawaii Supreme Court neither entertained the federal question nor decided it.

2. The Validity Of The Hawaii Workers' Compensation Law As An Exclusive Remedy For Work-Connected Injuries Is Well-Established.

The federal questions presented by Petitioner are at best specious. Petitioner's assertion that the Hawaii workers' compensation law, Chapter 386, Hawaii Revised Statutes is violative of Article III and Amendment XIII of

the United States Constitution is unfounded and frivolous. Allegations of involuntary servitude and slavery arising from a contract of hire are a stretch of the logic and are a desperate, last ditch attempt to salvage a claim properly and fully adjudicated by the Director, the Appeals Board and the Hawaii Supreme Court.

The validity of the workers' compensation law as an exclusive remedy for work-connected injuries is well-established. The Hawaii Supreme Court has held that the workers' compensation laws were enacted as a humanitarian measure to create legal liability without relation to fault. The Hawaii Supreme Court has further held that Section 386-5, Hawaii Revised Statutes clearly and unequivocally precludes a contribution action by a third party against an employer on the theory that the employer was a joint tortfeasor. The Hawaii Supreme Court recognized that Section 386-5, Hawaii Revised Statutes was a clear expression of legislative intent to absolve an employer of all liability to an injured employee except that imposed by statute. The Court indicated that the purpose of such legislation is to achieve certainty that an employee will be compensated for all work injuries irrespective of negligence or fault, and certainty with regard to the amount for which an employer shall be liable. Evanson v. University of Hawaii, 52 Haw. 595, 598, 483 P.2d 187, 190 (1971); Kepa v. Hawaii Welding Company, Ltd., 56 Haw. 544, 549, 545 P.2d 687, 691 (1976); Hanagami v. China Airlines, Ltd., 67 Haw. 357, 362-363 688 P.2d 1139, 1143-1144 (1984); Iddings v. Mee-Lee, 82 Haw. 1, 5-6, 919 P.2d 263, 269-270 (1996).

Petitioner attempted to pursue her claim and "preserve" the alleged federal questions by filing a civil action in California. Inclusion by Petitioner in her Appendix to her Petition For Writ Of Certiorari, of correspondence between the United States District Court and the Hawaii Supreme Court and any intimation of collusion as to the outcome of

both actions is repugnant to the integrity of the Courts, California counsel for the parties and the judicial system. The inquiry by the United States District Court as to the status of the pending Hawaii Supreme Court appeal was instigated at the request and urging of Petitioner's legal counsel.

The United States District Court agreed with Employer that Hawaii had a greater and more compelling interest in having its law applied to the case; therefore the exclusive remedy provision of Section 386-5, Hawaii Revised Statutes barred Petitioner's action in California. The United States District Court determined the connection of Petitioner's action to California was tenuous at best and Employer's Motion For Judgment On The Pleadings was granted. Attempting to preserve any alleged federal issue by filing the civil action in California only underscores Petitioner's failure to timely raise those alleged federal issues in the proper Hawaii forum.

VII. CONCLUSION.

This state case, addressing a state issue, interpreting a state statute, was properly and duly adjudicated before the Director, the Appeals Board and the Hawaii Supreme Court. Petitioner failed to raise and timely assert any federal constitutional issues before the Director, the Appeals Board and the record establishes no federal questions were passed upon by either the Director or the Appeals Board or reviewed by the Hawaii Supreme Court. Petitioner's feeble attempt to raise any alleged federal question in the supporting affidavit of the Motion For Reconsideration to the Hawaii Supreme Court falls woefully short of a well-established principle that the federal question must first be raised and passed upon by the state court or agency before the United States Supreme Court may review the matter.

Respondents respectfully request this Honorable Court deny Petitioner's Petition For Writ Of Certiorari for lack of jurisdiction.

DATED: Honolulu, Hawaii, August 21, 1997.

Of Counsel:
CHAR HAMILTON
CAMPBELL & THOM

ROLAND Q. F. THOM

LAURIE E. KEENO

Attorneys for Respondents
UNITED AIRLINES, INC.
and PACIFIC INSURANCE
COMPANY, LTD.

APPENDIX

CASE NO. 18726

IN THE SUPREME COURT OF THE
STATE OF HAWAII

DIANA FAIRECHILD, Claimant-Appellant, v. UNITED AIRLINES, INC., Employer-Appellee, Self-Insured, and PACIFIC INSURANCE COMPANY, Insurance Adjuster-Appellee.	)	CASE NO. AB 90-182 (2-89-02035) APPEAL FROM DECISION AND ORDER FILED NOVEMBER 2, 1994 AND ORDER DENYING CLAIMANT-APPELLANT'S MOTION FOR RECONSIDERATION AND REOPENING OF DECISION OR [SIC] ORDER FILED JANUARY 19, 1995 BY THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

NOTICE AND JUDGMENT ON APPEAL

CERTIFICATE OF SERVICE

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CASE NO. 18726

IN THE SUPREME COURT OF THE
STATE OF HAWAII

DIANA FAIRECHILD,	)	CASE NO. AB 90-182
	)	(2-89-02035)
Claimant-Appellant,	)	
	)	APPEAL FROM
v.	)	DECISION AND ORDER
	)	FILED NOVEMBER 2,
UNITED AIRLINES,	)	1994 AND ORDER
INC.,	)	DENYING CLAIMANT-
	)	APPELLANT'S MOTION
Employer-Appellee,	)	FOR
Self-Insured,	)	RECONSIDERATION
	)	AND REOPENING OF
and	)	DECISION OR [SIC]
	)	ORDER FILED
PACIFIC INSURANCE	)	JANUARY 19, 1995 BY
COMPANY,	)	THE LABOR AND
	)	INDUSTRIAL
Insurance Adjuster-	)	RELATIONS APPEALS
Appellee.	)	BOARD
	)	

NOTICE AND JUDGMENT ON APPEAL

TO: FRANK YAP, JR., CHAIRMAN OF THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD:

PLEASE TAKE NOTICE the following Judgment on Appeal is entered this day by the Supreme Court of the State of Hawaii:

Pursuant to the Memorandum Opinion of the Supreme Court of the State of Hawaii entered on January 16, 1997, the Decision and Order of the Labor and Industrial Relations Appeals Board filed on November 2, 1994 is affirmed.

DATED: Honolulu, Hawaii, February 13, 1997.

BY THE COURT:

/s/ K. Miyamura
Clerk

APPROVED:

/s/ Mario R. Ramil (SEAL)
Justice

CASE NO. 18726

IN THE SUPREME COURT OF THE
STATE OF HAWAII

DIANA FAIRECHILD,	)	CASE NO. AB 90-182
	)	(2-89-02035)
Claimant-Appellant,	)	
	)	APPEAL FROM
v.	)	DECISION AND ORDER
	)	FILED NOVEMBER 2,
UNITED AIRLINES,	)	1994 AND ORDER
INC.,	)	DENYING CLAIMANT-
	)	APPELLANT'S MOTION
Employer-Appellee,	)	FOR
Self-Insured,	)	RECONSIDERATION
	)	AND REOPENING OF
and	)	DECISION OR [SIC]
	)	ORDER FILED
PACIFIC INSURANCE	)	JANUARY 19, 1995 BY
COMPANY,	)	THE LABOR AND
	)	INDUSTRIAL
Insurance Adjuster-	)	RELATIONS APPEALS
Appellee.	)	BOARD
	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing document were duly served upon the following individuals by having said copies deposited in the United States mail, postage prepaid, to their last known addresses on this 17th day of January, 1997:

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IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF
SAN FRANCISCO

DIANA FAIRECHILD, Plaintiff, v. UNITED AIRLINES, INC., and Does 1 through 20, inclusive, Defendants.	)	No.: 976360 COMPLAINT FOR DAMAGES 1. Fraudulent Concealment of Existence of Injuries and Their Connection to Employment 2. Intentional Infliction of Emotional Distress

COMES NOW PLAINTIFF DIANA FAIRECHILD, and by and through her undersigned attorneys, and complains against UNITED AIRLINES, INC., ("UAL") as follows:

1. Plaintiff is and at all relevant times was a resident of the State of Hawaii.

2. Defendant, UNITED AIRLINES, INC., hereinafter "UAL" upon information and belief, at all times herein mentioned was and still is a corporation with their home office and principal place of business in Illinois, and was at all relevant times doing business in California, including the City and County of San Francisco.

3. Defendant Does 1 through 20, inclusive, are sued in this Complaint under the Code of Civil Procedure Section 474. The true names or capacities, whether individual, corporate, governmental, partnership, association or otherwise, of these defendants are unknown to plaintiff who, therefore, sues these defendants by such fictitious names. Plaintiff will amend this Complaint to show their true names and capacities when they have been ascertained. Plaintiff is informed and believes, and on that basis alleges, that each of the defendants designated as a DOE is negligently responsible for the events and happenings referred to in this Complaint, and thereby, caused injuries and damages to the Plaintiff.

COUNT ONE

FRAUDULENT CONCEALMENT OF EXISTENCE OF INJURY AND ITS CONNECTION WITH THE EMPLOYMENT

4. Prior to January 27, 1986, Plaintiff had been employed as a Flight Attendant by Pan American World Airways (PanAm), and then said Airline ceased doing business in the Pacific Rim and UAL acquired these Pacific routes. In anticipation of this acquisition of said air routes,

UAL began interviewing employees of PanAm in December 1985 to serve on these newly acquired routes.

5. On or about December 23, 1985, at Honolulu, Hawaii, Plaintiff and Defendant UAL entered into an employment agreement and as part of said agreement Plaintiff agreed to submit to a pre-employment physical examination, and she did submit thereto, and as part of the agreement she was required to disclose, and she did disclose, all of her past medical history and medical records to UAL, its agents, officers, pre-employment investigators, and physicians.

6. It was also part of said agreement, and understood by UAL and Plaintiff, whether oral or written, that Plaintiff would serve UAL under the supervision, control and command of UAL's designated officers, agents and supervisory personnel superior to her in rank, and that she would obey, without any reservations whatsoever, every command or order that related to the safety, security, well-being, comfort, and convenience of UAL's customers, who were the passengers aboard each and every flight on which she would serve as a Flight Attendant. UAL, its officers and agents, required Plaintiff to agree that she would so serve and obey and that she would accept each and every such order or command and carry out said order or command to the best of her ability. Plaintiff did agree and she did thereafter so obey, serve and carry out all her duties as assigned to her with the belief and conviction that each command and order was in the best interest of the passengers and also in her best interest. She did not know that UAL intended to poison her by spraying the inside of the planes with pesticides and use her as a guinea pig to purportedly show UAL passengers that they were not being sprayed with a deadly and harmful poison. Inherent in said employment agreement, it was understood and agreed that if

Plaintiff was poisoned either by accident or deliberately, that UAL, its officers, agents, including its hired physicians, would disclose to her the fact that she had been poisoned in connection with her employment, and would treat her for the poisoning, and all its sequelae, including both objective and subjective symptoms, and would not allow more serious effects of the poisoning to go untreated.

7. On or about August 12, 1986 plaintiff was ordered to report for duty and to fly from Honolulu to Auckland, New Zealand as a member of the crew working as a Flight Attendant on a UAL plane, flight No. 811, carrying many passengers. On or about August 13, 1986 said UAL plane arrived at Auckland International Airport in New Zealand. Prior to departure to said destination, plaintiff was informed by her supervisor that before debarkation all of the passengers and crew, including herself, everyone on board would be sprayed or subjected to a spray that was "non-toxic to humans." Plaintiff was ordered to give that information to all the passengers. Plaintiff relied upon said representations and in compliance with said command, she so informed the passengers, and in reliance upon said representations and command she prepared to expose herself to the spray fully believing that it was "non-toxic" and harmless to humans. After the plane landed it was taxied to an arrival gate at Auckland International Airport and agents from New Zealand came aboard and emptied six cans of an alleged "non-toxic" aerosol insecticide sprays into the aircraft cabin and said spray landed on the skin, hair, and clothing of plaintiff and filled the air in said cabin where she was stationed so that said spray entered her nose, mouth, throat, lungs, eyes, and all exposed pores of her body. UAL closed all air vents and fresh air intakes to assure the spray would be most effective.

8. That as a result of the poisoning as heretofore stated, plaintiff became extremely ill with headaches, nausea, swollen eyes rimmed with scales, pus-like substance secreting from her eyes, chest pain, tremors, weakness of knees, incontinence, increased sinus congestion, and a general malaise, and upon informing UAL of her condition, UAL sent her to a physician selected by UAL in Auckland, New Zealand, Dr. Simon Barclay.

9. Dr. Barclay was the selected agent and servant of UAL and although he knew that plaintiff had been poisoned, he fraudulently concealed her injury and its connection to her employment, and did not treat her poisoning, thus allowing the condition to be aggravated.

10. Upon Plaintiff's return to Honolulu from Auckland, she was required to be checked by Dr. Wilson, another physician selected by UAL and whose services were paid for by UAL. Dr. Wilson diagnosed plaintiff's conditions as "allergic blepharitis" and he did not treat plaintiff's poisoned condition. Plaintiff never fully recovered from the deliberate poisoning of August 13, 1986 and she was exposed to further pesticides while employed by defendant, which exacerbated her condition, requiring further medical attention. UAL and its officers and physicians continued to inform Plaintiff and others that the spray used in their airplanes was "non-toxic" and harmless to humans and that she had not suffered any injury while in the course of her employment with UAL.

11. Plaintiff was exposed to harmful and deleterious amounts of pesticide while employed as a Flight Attendant for defendant and became seriously ill, which illness and its connection to said employment, was fraudulently concealed from her by defendant and its officers and agents, including physicians, thus aggravating the injuries further. Defendant

is liable to plaintiff for injuries within the meaning of Section 3602(b)(2) of the California Labor Code.

12. It was also inherent and implied in said employment agreement, that UAL would not intentionally poison her, and require her to inform UAL's passengers, whom she was required to serve and guide in all matters of safety, that they were not being deliberately sprayed with a harmful poison. It was also inherent and implied that defendant would not require her to act as a guinea pig to further convince the passengers that she knew that the spray was harmless when sprayed on them or on their children or pets aboard UAL aircraft. Plaintiff was forced, by said demonstration, to emphasize that neither she nor the passengers under her supervision need take any precautions or protect themselves in any way whatsoever from the poisonous pesticides.

13. Plaintiff accepted the duties imposed upon her, believed the instructions and orders were honestly and truthfully given, and she relied upon said representations, orders and instructions and she carried out her duties, without ever suspecting that she was being poisoned, as were the passengers assigned to her care. Plaintiff never suspected that UAL, its officers and supervisors and its hired physicians knew she was being poisoned and injured in connection with the employment. Plaintiff never suspected that defendant knew the passengers were being poisoned and that she was being deliberately poisoned and used as a guinea pig to help UAL deceive and poison UAL passengers.

14. Plaintiff relied upon all of the representations made by UAL, its officers, supervisory personnel, examining physicians, and pre-employment investigators, and her reliance was reinforced by suggestions, instructions, and directions that were in the nature of commands that she

was to be concerned for the safety and comfort of UAL passengers. Plaintiff was told at all times that she was to take extreme caution to avoid doing anything which would in any way inconvenience, harm, or cause discomfort to any of UAL's passengers and she was required to ensure the safety of UAL's passengers at all times, no matter how inconvenient, uncomfortable, annoying, or even hazardous it was to her.

15. Plaintiff was so thoroughly deceived by UAL, its officers, supervisory personnel, and especially by its physicians, that she continued to believe UAL representations until recently when she read for the first time the document, "Passenger Complaint Regarding Spraying of Pesticides on Aircraft", written by Scott Robinson, an official from UAL with authority to disclose this information. Mr. Robinson's memo of December 23, 1987 informed all department heads at UAL that its passengers and crew were being subjected to a very toxic and poisonous spray while they were confined in UAL airplanes and under UAL control and supervision. When Plaintiff first became aware that defendant had known that UAL employees such as herself had been subjected to toxic pesticides and injured in connection with her employment by defendant, she cried uncontrollably for hours and was so profoundly affected she could not eat or leave her bed for days.

16. As a result of the continuous fraudulent representations that the spray was "non-toxic to humans" and the continuous representations by UAL's selected physicians that she was just suffering from symptoms that could be treated with eye-drops and creams, Plaintiff was never treated for the poisoning nor was she informed that she had been deliberately poisoned, with the result that after

some of the more visible symptoms of her eyes disappeared she was ordered back to work and she complied.

15. On each flight after August 13, 1986, her symptoms recurred and she was required to seek medical attention. That UAL through its officers and agents accused her of having an "adjustment disorder" from making the transition from PanAm to UAL, and as because plaintiff did not understand that she had been deliberately poisoned she sought psychiatric help when she was told to do so by her supervisor.

16. Although she was still ill, she attempted to continue working as a Flight Attendant, but with much difficulty.

17. On or about December 19, 1987, on a flight from Honolulu to San Francisco, plaintiff was required to serve aboard a UAL plane that had just previously made stops in New Zealand and Australia before arriving in Honolulu, and said plane had been sprayed with the same poisonous substance on at least three (3) occasions immediately preceding its arrival in Honolulu with the result that its carpeting, seats, fabric, and vents were filled with or covered with a residue of said poisonous spray. That while enroute to San Francisco she began to feel ill with body aches, conjunctivitis, cough, headache and a fever and she was so ill that she spent the entire layover in bed in an effort to be able to make the return flight to Honolulu the next day, on which flight plaintiff's cough and other symptoms worsened.

18. In reliance upon the prior treatments and medication plaintiff went to bed and remained in bed at her home in Honolulu until December 22, 1987, when she was ordered to immediately go to see UAL's physician, Dr. Elmer Johnson for "sick call verification" and in compliance plaintiff did so.

19. Dr. Elmer Johnson took a history from plaintiff and although he knew that she had been subjected to a poisoning he never informed plaintiff thereof and diagnosed her only for what he defined as "cough," "cold," "fever" and "pharynx infected." Dr. Johnson did not prescribe medication for plaintiff's symptoms and told plaintiff to come back to him on December 26, 1987 for a follow-up "sick call verification." When plaintiff checked-in with Dr. Johnson on December 26th, he attributed her condition to "coughing," "mucous," and "respiratory infection." Dr. Johnson did not prescribe medication for these symptoms and he told plaintiff that when she was well she should have her personal physician provide a note stating that she was ready to return to work and then she should bring this note to him.

20. Plaintiff was unable to return to work because she had developed a sensitivity to all antibiotics, sulfa drugs, penicillin, myocins, house dust, newsprint, tobacco smoke, perfumes, powders, insecticides, jet fuel, propane, hair spray, carpet, dairy products, and synthetic fabrics and she became completely disabled as a result of the poisoning, she was subjected to by UAL.

21. On January 24, 1989, without knowing or being informed by UAL or any of its officers, agents or physicians that she had been deliberately poisoned by UAL and without ever being treated for said poisoning, plaintiff filed a worker's compensation claim against UAL alleging that she had been "accidentally" injured in the course of her employment as a result of accidental exposure in her workplace to the chemical D-Phenothrin, the principal chemical in the pesticide used to disinfect UAL's airplanes. Plaintiff believed and claimed that said accidental exposure had taken place on or about December 20, 1987 on the Honolulu to San Francisco flight as aforesaid.

22. Plaintiff's physician Dr. Gregory Yuen, a psychiatrist, diagnosed plaintiff's emotional difficulties or mood swings as the result of an organic, or physical cause, and Dr. George Ewing, an allergy specialist and expert in diagnosing and treating Multiple Chemical Sensitivity (MCS) has diagnosed and treated plaintiff for MCS.

23. UAL by and through its officers, agents, and physicians continued the fraudulent concealment of the deliberate and intentional poisoning of plaintiff and withheld from the Worker's Compensation Board, Hawaii, the fact that UAL had intentionally sprayed a poison on her and into the air, which she was required to breath in an amount her system could not tolerate and as a result she had become poisoned and she was never treated for the poisoning. As a result of said fraudulent concealment of the existence of the injury and additional exposures to more of the poison, she became totally disabled, lost income and all of her employment and much of her retirement and employment benefits, including workers' compensation and rehabilitation benefits, and medical and related expenses, all to her damage in a sum that exceeds the minimum jurisdiction of this Court but which will be established at trial of this matter. In addition, defendant's conduct has demonstrated a criminal indifference to plaintiff's rights so as to warrant the imposition of punitive damages.

COUNT II

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

29. Plaintiff reiterates and incorporates by reference all of the allegations in Paragraphs 1 through 28, above.

30. As a Second Claim plaintiff further alleges that defendant intentionally inflicted great mental suffering on her and physically and emotionally harmed her up to and including March 1, 1995 in order to so ostracize her from her chosen career and employment in the industry, physically, economically as well as socially, that she would never be able to recover, all to her special and general damages in an amount that exceeds the minimum jurisdiction of this Court but as will be established at trial.

31. That the defendant acted willfully and with a design to inflict said damages and said conduct warrants the imposition of punitive damages as punishment for such gross misconduct and as a deterrent to defendant and others in the future.

WHEREFORE plaintiff asks for judgment against defendant UAL for the following:

A) Special damages according to proof;
B) General damages;
C) Punitive damages;
D) Attorney's Fees;
E) Other such further relief.

Dated: February 21, 1996, San Francisco, California.

LAW OFFICES OF
MELVIN BELLI

/s/ Thomas J. Kaster
Thomas J. Kaster
Attorneys for Plaintiff
DIANA FAIRECHILD

LABOR AND INDUSTRIAL RELATIONS
APPEALS BOARD

STATE OF HAWAII

DIANA FAIRECHILD,	)	CASE NO. AB 90-182
	)	(2-89-02035)
Claimant-Appellant,	)	
	)	
vs.	)	
	)	
UNITED AIRLINES, INC.,	)	
	)	
	)	
Employer-Appellee, Self-Insured,	)	
	)	
and	)	
	)	
PACIFIC INSURANCE COMPANY,	)	
	)	
	)	
Insurance Adjuster-Appellee.	)	
	)	

ORDER DENYING CLAIMANT-APPELLANT'S MOTION FOR RECONSIDERATION AND REOPENING OF DECISION OR [SIC] ORDER

Having heard Claimant-Appellant's motion for reconsideration and reopening of decision or [sic] order filed December 1, 1994, having considered Employer/ Insurance Carrier's memorandum in opposition filed

January 6, 1995, and its request to strike certain materials filed by Claimant after November 2, 1994, and being fully apprised,

IT IS HEREBY ORDERED that:

1. Claimant's motion for reconsideration and reopening of decision or [sic] order is denied;

2. The exhibits numbered one through six and attached to Claimant's motion for reconsideration and reopening shall be strickened from the record;

3. The Honolulu Star Bulletin article attached to Claimant's letter of November 3, 1994, addressed to the Chairman, shall be strickened from the record; and

4. The Hawaii Trial Lawyers Association article attached to Claimant's letter of December 8, 1994, addressed to the Chairman, shall be strickened from the record.

Dated: Honolulu, Hawaii, January 19, 1995.

/s/ Frank Yap, Jr.
FRANK YAP, JR., Chairman

/s/ Carol K. Yamamoto
CAROL K. YAMAMOTO, Member

/s/ Charles T. Akama
CHARLES T. AKAMA, Member

STATE OF HAWAII

DEPARTMENT OF LABOR AND
INDUSTRIAL RELATIONS

DISABILITY COMPENSATION DIVISION

DIANA E. FAIRECHILD P. O. Box 300 Makawao, Hawaii 96768, Claimant.	)	DECISION
UNITED AIRLINES Terminal Box 35 Honolulu International Airport Honolulu, Hawaii 96819, Employer, Self-Insured.	)	Case No: 28902035 D/A: December 20, 1987 SSN: 102-36-4758
PACIFIC INSURANCE COMPANY, LTD. P. O. Box 1140 Honolulu, Hawaii 96807.	)	

Such investigation of the above-entitled matter having been made as he deems necessary, the Director makes the following

FINDINGS OF FACT

On January 24, 1989, the claimant filed an Employee's Claim for Workers' Compensation Benefits (WC-5), indicating she sustained an accident on December 20, 1987. Claimant described her accident as secondary exposure to pesticides via carpets, seat fabrics, etc., and direct pesticide exposure in Australia and New Zealand while a flight attendant. As a result, claimant complained of dizziness, nausea, etc., when exposed to smoke, chemicals, pesticide environmentally allergic, pain in the liver, depression, motor impairment, burning around the body, headache, conjunctivitis, blepharitis, memory loss, confusion, coughing, back pain and nervous breakdown.

The employer denied the above claim filed by the claimant. Consequently, a hearing to address the issue of compensability was held on September 27, 1989.

The parties presented their respective positions and testimonies at the September 27, 1989 hearing. An extension agreement beyond the statutory limit of 60 days was agreed upon at the hearing to allow for additional medical discovery as well as post-hearing position papers.

The claimant presented the following synopsis: 1) The claim dated January 19, 1989 should be found compensable that claimant suffers from multiple chemical sensitivity due to exposure to pesticides for over 20 years while with Pan Am, her previous employer, and again with United Airlines (hereafter United), her latest employer. Claimant's last exposure with United aggravated this condition to the point that she is no longer able to work; 2) George M. Ewing, M.D., and William J. Rea, M.D., both opined that claimant suffers from multiple chemical sensitivity. Furthermore, Dr. Ewing, claimant's treating physician since 1985, substantiated claimant's position and opined that claimant's

exposure to volatile chemicals while with United aggravated her problems to the point where claimant was unable to function and work; 3) Claimant has been disabled from this condition since December 25, 1987 and has not been released to work. Therefore, claimant is due temporary total disability for the aforementioned period. Moreover, claimant should be referred for vocational rehabilitation services since her attending physician, Dr. Ewing, indicated that claimant cannot return to work as a flight attendant; 4) Claimant did provide the employer with proper notice of her injury pursuant to Section 386-81, HRS, and, therefore, her claim for workers' compensation benefits should be deemed timely under Section 386-82, HRS.

The employer's argument consisted of the following conclusions: 1) The claimant did not sustain a personal injury under Section 386-3, HRS. There was no causal relation between claimant's current condition with any incident or condition of her employment with employer, United, that occurred on or about December 20, 1987. Accordingly, claimant's present condition cannot be deemed to have arisen out of and in the course of her employment and thus, claimant sustained no personal injury as defined under Section 386-3, HRS; 2) The employer indicated that the medical evidence submitted and relied upon by claimant is unreliable to trigger the presumption. The employer added Eric G. Comstock, M.D., and John T. McDonnell, M.D., have shredded the theory advocated by Drs. Ewing and Rea regarding claimant's condition. Therefore, since Dr. Ewing's and Dr. Rea's diagnoses flow from unproven and unscientific speculation, their opinions should be given little probative weight; 3) If claimant's exposure to decontaminants is deemed to be a work-related injury, said injury is a result of employment with Pan Am. The employer stated that Dr. Ewing's diagnosis of chemical

sensitivity was made in February 1985. Claimant, in fact, filed an Employee's Claim for Workers' Compensation Benefits (WC-5) against Pan Am in 1985 for her exposure but subsequently withdrew the claim voluntarily in December 1985; 4) Claimant provided insufficient notice of injury pursuant to Section 386-81, HRS. Claimant's claim for chemical sensitivity was dated in 1989. However, claimant was aware of her condition at least by December 1985 upon Dr. Ewing's diagnosis for claimant's condition or at least by August 1986 upon treatment of her condition. Since her claim was not filed within two years, her claim for compensation should be time barred pursuant to Sections 386-81 and 386-82, HRS; 5) If claimant's condition is related to her employment, claimant has sustained subsequent aggravations for which the employer is not liable. Claimant sustained acute nonindustrial exacerbations on March 8, 1988 and on December 6, 1988, which she reacted unusually.

Upon review of the entire matter, the Director finds the following: 1) Claimant did not sustain any injury pursuant to Section 386-3, HRS, for multiple chemical sensitivity during her employment with United. If claimant intended to pursue this matter as a work-related injury/illness, she should have pursued it against Pan Am, since the records reveal claimant had this condition as far back as February 1985. The records further reflect that Dr. Ewing was a proponent that claimant pursue this matter against her then employer, Pan Am, as reflected in Dr. Ewing's February 5, 1986 letter to claimant; 2) Claimant did not sustain aggravations of her injury/illness at United. Instead, the exacerbations claimant experienced from her chemical sensitivity while with United are held to be recurrences of symptoms which began with her exposure at Pan Am. The chronicity of claimant's problems with chemical sensitivity

have not heightened since she treated with Dr. Ewing in February 1985. Claimant was still employed with Pan Am at the time. The Straub Clinic and Hospital records transcribed on February 13, 1985 from Dr. Ewing already noted the same characterization of symptoms then compared to now. Claimant already presented burning of her throat, pain in her head, disorientation, frontal headaches, eye irritation, and pain and muscle spasms of the neck in 1985, while still employed with Pan Am; 3) The claimant's inability to resume her employment as a flight attendant is a result of the added adjustment disorder with mixed emotional features that has developed over time. The records reveal that claimant was referred by Dr. Ewing to Greg Yuen, M.D., after encounting stressors in both her personal and work situation. Dr. Yuen then disabled claimant from returning to work with the employer from December 31, 1987. If the claim for adjustment disorder is related to the chemical sensitivity condition, then this psychological component of her claim must be held a compensable consequence of her original injury that occurred with Pan Am, since there was no injury per se with United.

Therefore, the Director concludes that claimant has not sustained any work-related injury/illness during her employment with United on December 20, 1987. Claimant's Employee's Claim for Workers' Compensation Benefits (WC-5) filed January 24, 1989 is hereby denied.

Thereupon the Director makes the following

DECISION

1. The claim for compensation filed January 24, 1989 is hereby denied.

BY ORDER OF THE DIRECTOR, FEBRUARY 23, 1990.

/s/ Clyde Imada for
Administrator

APPEAL: This decision may be appealed by filing a written notice of appeal with the Director of Labor and Industrial Relations or his county representative within twenty days after a copy of this decision has been sent.

Supreme Court, U.S.
FILED
SEP 15 1997
CLERK

(4)

NO. 97-178

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

DIANA FAIRECHILD,
Petitioner,

v.

UNITED AIRLINES, INC. AND
PACIFIC INSURANCE COMPANY, LTD.,
Respondents

On Petition for Writ of Certiorari to the Supreme Court of the State of Hawaii

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PETITIONER'S REPLY TO UNITED AIRLINES BRIEF IN OPPOSITION

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DIANA FAIRECHILD.

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PETITIONER'S REPLY TO UNITED AIRLINES BRIEF IN OPPOSITION

1. Summary of Argument:

Judged solely from the posture of the Respondent and the content of the Brief in Opposition, it is respectfully submitted that the Supreme Court of the United States ought to grant certiorari.

The Respondent's Brief informs the Supreme Court that the "scenery" has changed from an "Uncle Tom's Cabin" to a plush airlines cabin, but that the "scenerio" of treating workers like slaves has been brought current. The Thirteenth Amendent is mandatory, however, it is not self-executing.

> A cabin is a cabin.
> A Master is a Master.
> A Servant is a Servant,
> And the "Law of Slavery" is still an unnatural law made by humans and their corporations in control of a Government.

When a State authorizes and encourages a Master to intentionally poison or otherwise abuse and waste a Servant while the Servant is working in the Master's cabin, and the Servant complains, and the Master instructs the Justices of the United States Supreme Court that they must sit obediently and silently in their seats, with their "seatbelts" (Juris-

diction) securely fastened while the Slave State protects the Master and silences the Servant with a Memorandum Opinion, the result is the same as when the Law of Slavery was the Supreme Law of our Country.

2. THE UNITED STATES SUPREME COURT HAS JURISDICTION AND OUGHT TO ENFORCE AMENDMENT XIII SUA SPONTE

In Herndon v. Georgia, 295 U.S. 441,447 J. Cardozo,dissenting with J. Brandeis and J. Stone (1934) wrote: " The settled doctrine is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely. Missouri v. Gehner, 281 U.S. 313, 320; Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673,678; American Surety Co. v. Baldwin, 287 U.S. 156,164; Great Northern Ry.Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 367; Saunders v. Shaw, 244 U.S. 317, 320. Within that settled doctrine the cause is rightly here."

It is the following sentence at 447 that explains why Petitioner must go into the merits and demonstrate how the federal issue came into the record. "Though the merits are

now irrelevant, the controversy must be so far explained as to show how a federal question came into the record".

The record demonstrates that the State of Hawaii has written into every employment contract the protected right of the employer ("MASTER") to intentionally poison, abuse or otherwise waste an employee ("SERVANT") and be responsible to the so abused Servant only to the extent of "bread and butter" money and necessary medical expense. That, it is respectfully submitted, is what the Master gave to the flogged Slave, if the said worker was still a valuable item of property; otherwise the said worker was discarded. (Ms. Fairechild was discarded without "bread and butter or necessary medical expense").

The record also demonstrates that lawyers and Judges appear to be so brainwashed, they are unable to percieve the existence of this unnatural law. Not only are those scholars insensitive to this brutal and cruel practice of intentionally poisoning employees, the record demonstrates that American Scholars of History, Journalism and Law (to name a few) have been sitting obediently and silently in the Masters' plush cabins with their seatbelts securly fastened while they were deprived of

fresh air, sprayed-like bugs- with a poison, and their lungs, nasal passages, lips, eyes and skins exposed to a fifteen (15) minute saturation of the poisoned atmosphere. Some of those Scholars and other meek passengers must have had allergies, diabetes, asthma, perforated ear drums, or other chronic conditions. Of course, the aforesaid passengers have their common law right to hold the Masters liable; but not the poisoned Servant under Hawai'i Law. That was why this Servant, Diana Fairechild, fled to the Free State of California where the Law of Freedom is respected.

Fairechild's flight from the Slave/Involuntary Servitude State of Hawai'i to the Free State of California can be compared with the flight of Margaret Morgan in 1832 from the Slave State of Maryland to the Free State of Pennsylvania. (Prigg v. Pennsylvania, 41 U.S. 539 (1857). Ms. Morgan was called a "Fugitive from labor". Ms Fairechild is a "Fugitive from labor law". Ms. Morgan was a victim of all of the cruel and brutal badges and incidents of the Law of Slavery. Ms. Fairechild was a victim of only the repetitive intentional poisonings by the corporate Masters who own the cabins.

Ms. Morgan, and her children, born to her under the Freedom Laws of Pennsylvania, were

subjected to the "Fugitive Slave Act of 1793" and relegated back to the State of Maryland Law of Slavery.

The corporate Master in Ms. Fairechild's case was permitted to weave its own "Fugitive Slave Act" and using a combination of the Federal Rules and the "Workers' Compensation Law of Hawai'i", relegated Ms Fairechild back to the Law of Hawai'i that protected the corporate Master and approved of its intentional poisoning and wasting her.

Appendix D presents the communications between the Federal Court (Northern District of California) and the Supreme Court of Hawai'i. These letters demonstrate that the Hawai'i Supreme Court was put on notice of the substantial differences between the compensation laws of California and Hawai'i and that Ms. Fairechild had confronted the corporate Master in California for having intentionally poisoned her.

The record shows that the Hawai'i Supreme Court knew, or should have known, that a violation of Amendment XIII existed.

> "Neither slavery nor involuntary servitude shall exist within the United States, or any place subject to their jurisdiction".

The Hawai'i Supreme Court refused to hear oral argument and disposed of Ms. Fairechild's

case via a "MEMORANDUM OPINION". (Appendix A).

This MEMORANDUM OPINION is the overt act of the State in support of the corporate Master's intentional poisoning and wasting of this human being. It is respectfully submitted that the Supreme Court of Hawai'i is an integral part of the Government that must provide "protection by the Government" to human beings as defined and instructed by the Supreme Court of the United States in Hodges v. United States, 203 U.S. 1, 15 (1905)

Ms. Fairechild's motion for reconsideration of the MEMORANDUM OPINION was timely and it clearly informed the Hawai'i Supreme Court that its action was a violation of Amendment XIII.

> "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it". Herndon v. Georgia, p.444.

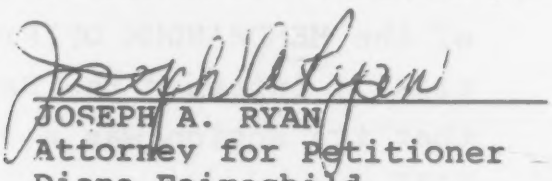
3. CONCLUSION

The record clearly demonstrates that Amendment XIII has been, and is being disregarded and violated by the State of Hawai'i. The People and the States need the help of the United States Supreme Court, and especially the employees in the State of Hawai'i. The State protection of corporate Masters who

intentionally poison and waste employees ought to be stopped. Granting the writ of certiorari will effectively give the Masters and the State an opportunity to show why the industries in Hawai'i need the protected right to poison and otherwise intentionally waste employees hired in Hawai'i.

DATED: Honolulu, Hawai'i August 29,1997

Respectfully submitted,



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